84-1978

No. _____

Office-Supreme Court, U.S.
FILED
JUN 20 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOHN SPICER, JR.,
Private First Class, United States Army,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTIONS PRESENTED

1. WHETHER the military has ignored congressional intent by using the general article of the Uniform Code of Military Justice to impermissibly create a homicide offense based upon simple negligence.

2. WHETHER military authorities may use the general article of the Uniform Code of Military Justice to establish a simple negligence standard for criminal homicide in the face of compelling evidence that Congress intended a higher standard of criminal culpability to apply to homicide offenses.

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JOHN SPICER, JR.,
Private First Class, United States Army,
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v.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, John Spicer, Jr. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the Court of Military Appeals is reported at —— M.J. —— (CMA 1985) (Appendix A). The opinion of the Army Court of Military Review is unpublished, CM 443478 (ACMR 21 May 1984) (Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on 23 April 1985, affirming petitioner's convic-

tion dated 4 October 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259.

STATUTORY PROVISIONS INVOLVED

The Uniform Code of Military Justice provides:

Article 118, 10 U.S.C. § 918 (1982)

> Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being when he—
>
> (1) has a premeditated design to kill;
>
> (2) intends to kill or inflict great bodily harm;
>
> (3) is engaged in an act which is inherently dangerous to others and evidences a wanton disregard of human life; or
>
> (4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;
>
> is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct.

Article 119, 10 U.S.C. § 919 (1982)

> (a) Any person subject to this chapter who, with an intent to kill or inflict great bodily harm, unlawfully kills a human being in the heat of sudden passion caused by adequate provocation is guilty of voluntary manslaughter and shall be punished as a court-martial may direct.
>
> (b) Any person subject to this chapter who, without an intent to kill or inflict great bodily harm, unlawfully kills a human being—
>
> (1) by culpable negligence; or

> (2) while perpetrating or attempting to perpetrate an offense, other than those named in clause (4) of section 918 of this title (Article 118) directly affecting the person;
>
> is guilty of involuntary manslaughter and shall be punished as a court-martial may direct.

Article 134, 10 U.S.C. § 934 (1982)

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces . . . of which persons subject to this chapter may be guilty shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

STATEMENT OF THE CASE

On the morning of 22 May 1982, petitioner's car struck Army Colonel Frank J. Lindstrom as he jogged on a sidewalk at Fort Bliss, Texas. Colonel Lindstrom died shortly thereafter at 8:20 a.m. (R. 42-43).

Petitioner had borrowed his girlfriend's car and left her apartment in the neighboring city of El Paso, Texas at about 6:45 A.M. (Prosecution Exhibit 4). Petitioner entered the Fort Bliss military reservation and proceeded down Sheridan Road at approximately 30 miles per hour. He noticed Colonel and Mrs. Lindstrom "jogging up ahead" and started to change lanes. As he did so petitioner saw a taxi "right at the rear of [his] car." *Id.* He felt the car hit a bump, his eyes blurred, and, as petitioner described it:

> the car pulled to the right, striking the curb and proceeding toward the man and woman. . . . The

> car then struck the man, right around the bumper and the fender, causing him to hit the passenger side mirror with his head. . . .

Id. Petitioner's car also knocked down two portable school signs placed in the middle of the sidewalk and proceeded down the street before turning around and returning to the scene (R. 35).

Specialist Four Paul E. Landry, Jr., a passenger in the taxi following petitioner's car, also witnessed the accident. He saw appellant's car traveling in the right lane "about two-tenths of a mile ahead of us heading in the same direction" (R. 39-40). Specialist Landry "heard the tires squeak and . . . looked up and seen (sic) the car was off the road and then after about two seconds the car came back on the road." (R. 39-40). The car continued down the road a distance Landry estimated to be three-tenths to four-tenths of a mile, and then returned to the accident scene where Landry and the cab driver were assisting Mrs. Lindstrom.

Although the day was cloudy, there was no fog, it was light out, and the roads were dry (R. 34). Blood tests performed on petitioner showed no trace of drugs, other than aspirin (R. 110-11). While no obstructions in the road were identified, Mrs. Lindstrom indicated that she heard a "rattley" noise, "as if a car ran over a branch," just before the accident (R. 34-35). The government introduced no evidence to show that petitioner exceeded the speed limit on Sheridan Road (the actual speed limit was not established at trial). A later inspection of the vehicle showed that, although the air pressure in one tire was low, the braking and steering mechanisms as well as "all other systems" were in "very good shape." (R. 54-55).

Petitioner was tried by a general court-martial on 15 September and 4 October 1982 on a single charge and specification alleging that he had violated Article 134 of the Uniform Code of Military Justice (UCMJ) because

he unlawfully killed Frank J. Lindstrom "by driving a car against the said Frank J. Lindstrom in a negligent manner." [1] Contrary to his pleas, and after a bench trial, petitioner was convicted as charged and sentenced to a bad-conduct discharge from the Army, confinement at hard labor for 365 days, forfeiture of all pay and allowances, and reduction to the grade of Private E-1. The lower appellate courts have considered the questions presented in this petition. As a prerequisite to this Court's jurisdiction, the Court of Military Appeals granted the following issue:

> WHETHER, ON RECONSIDERATION OF THIS COURT'S HOLDING IN *UNITED STATES v. KICK*, 7 M.J. 82 (CMA 1979), NEGLIGENT HOMICIDE SHOULD BE DELETED AS AN OFFENSE CHARGEABLE UNDER THE UNIFORM CODE OF MILITARY JUSTICE IN LIGHT OF EVIDENCE FROM THE LEGISLATIVE HISTORY THAT CONGRESS INTENDED TO IMPOSE CRIMINAL LIABILITY ONLY FOR HOMICIDAL ACTS AMOUNTING TO CULPABLE NEGLIGENCE, CHARGEABLE UNDER ARTICLE 119, UCMJ.

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[1] Petitioner was charged and convicted under the first two clauses of Article 134 for conduct alleged to be prejudicial to good order and discipline, and of a nature to bring discredit upon the armed forces, rather than the third clause, which incorporates "crimes and offenses not capital."

The Charge and Specification read:

> Charge: Violation of the Uniform Code of Military Justice, Article 134.
>
> Specification: In that Private First Class John Spicer, Jr., US Army, 978th Military Police Company, US Army Air Defense Center and Fort Bliss, Fort Bliss, Texas, did, at Fort Bliss, Texas, an installation under exclusive military control on or about 22 May 1982, unlawfully kill Frank J. Lindstrom, by driving a motor vehicle against the said Frank J. Lindstrom in a negligent manner.

REASONS FOR GRANTING THE WRIT

When Congress enacted Articles 118 and 119 of the UCMJ it established a detailed, comprehensive listing of the homicides for which criminal liability would be imposed. These specific articles require a showing of at least culpable negligence and have *no* provisions permitting a homicide prosecution based on simple negligence. To convict petitioner military authorities simply ignored the requirements of Articles 118 and 119 and used the general article (Article 134) to fashion the additional offense of negligent homicide, based upon a lesser, traditionally non-criminal[2] standard of simple negligence. Such an action is contrary to the congressional treatment of unlawful homicide in the military and is not supported by either the statute itself or the legislative history.

I. THE LEGISLATIVE HISTORY OF THE UNIFORM CODE OF MILITARY JUSTICE CLEARLY DEMONSTRATES THAT CONGRESS DID NOT INTEND THAT HOMICIDE PROSECUTIONS WOULD BE BASED UPON A SIMPLE NEGLIGENCE STANDARD.

In federal criminal law courts must follow Congress' intent as to the level of culpability needed to impose criminal liability. *United States v. Bailey*, 444 U.S. 394, 406 (1980). With respect to the UCMJ the statute and its legislative history provide persuasive evidence that Congress intended Articles 118 and 119 to "cover the field" and establish *culpable* negligence as the minimum liability threshold for criminal homicide in the military. Such a Congressional determination leaves no room for military authorities to substitute a lesser standard by resort to the general article.

Prior to the passage of the UCMJ in 1950, military law denounced criminal homicides only in very general

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[2] *See* 2 C. Torcia, Wharton's Criminal Law § 168 (14th ed. 1979).

terms. The Articles of War,[3] which governed the Army and the Air Force, simply included "murder" and "manslaughter" in a laundry list of crimes, with no further statutory definition. *See* Articles of War 92-93, 10 U.S.C. §§ 1564-65 (1946). Navy practice was even less well defined. The Articles for the Government of the Navy (A.G.N.)[4] specifically listed only murder as a crime, and then only when committed outside state jurisdiction. Art. 6, A.G.N., 34 U.S.C. § 1200 (1946). Both the Army and the Navy also laid certain homicide prosecutions under their respective general articles. The Navy used Article 22, A.G.N., to prosecute manslaughter offenses, but did not recognize negligent homicide as a lesser offense. *See* Section 119, *Naval Courts and Boards* (1937). Only in 1944 did the Army begin prosecuting the crime of negligent homicide under Article 96 of the Articles of War.[5]

Congressional dissatisfaction with the treatment of homicide under this prior law resulted in a commitment to a far more detailed definition of the various homicide crimes in the new UCMJ. The draft of the UCMJ presented to Congress explicitly defined four categories of murder in proposed Article 118, including premeditated murder, unpremeditated murder, murder through an inherently dangerous act, and felony murder. Proposed Article 119 delineated the various categories of homicide short of murder, which included voluntary manslaughter, involuntary manslaughter, and misdemeanor manslaughter, but *not* negligent homicide. *See* Hearings on

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[3] Articles of War, 10 U.S.C. §§ 1471-1593a (1946) (repealed 1950).

[4] Articles for the Government of the Navy, 34 U.S.C. § 1200, Arts. 1-70 (1946) (repealed 1950).

[5] The Manual for Courts-Martial, United States Army, did not list negligent homicide as a crime until 1949. *See* pp. 12-14, *infra*. *Compare* para. 163, app. 4, Manual for Courts-Martial, United States Army (1949) *with* paras. 121-167, app. 4, Manual for Courts-Martial, United States Army (1928).

H.R. 2498 Before a Subcommittee of the Committee on Armed Services, 81st Cong., 1st Sess., at 1231-32 (1949) (hereinafter cited as House Hearings). The accompanying commentary demonstrates that negligence would not be "criminal" unless it met the standards of the newly proposed Article 119. According to the drafters, the new involuntary manslaughter section (Article 119(2)) "covers that type of involuntary manslaughter where the homicide results from *criminal negligence*". *Id.* at 1232 (emphasis added). After extended discussion before the House subcommittee, the proposed Articles 118 and 119 were adopted with a greater degree of precision in their definitions and penalties because of the concern among committee members about the distinctions between intended and unintended killings as well as voluntary and involuntary manslaughter. *Id.* at 1243-53.[6]

This detailed treatment of criminal homicide, when considered with the discussion before the House subcommittee, conclusively demonstrates that Articles 118 and 119 of the UCMJ were not merely a haphazard reenactment of prior law, but a considered congressional determination to completely define the scope of criminal homicide in the military. The two Articles encompassed all the forms of homicide which had previously been prosecuted under both the general and the specific articles of the Articles of War and the Articles for the Government of the Navy, with one exception—the novel position that negligent homicide should be a military crime was *not* carried forward in the new UCMJ. This exception was not a mere oversight by Congress, but a deliberate decision to make culpable negligence the minimum standard for criminal liability. When a simple negligence standard was mentioned by the agency representative presenting the draft of the Uniform Code to the subcommittee he was quickly corrected and agreed that the proper stand-

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[6] The text of this portion of the subcommittee hearings is set forth at Appendix C, pp. 14a-35a.

ard for unintentional killings would be *culpable*, not simple negligence. *House Hearings*, pp. 1247-48, *reproduced at* Appendix C, pp. 23a-25a.

The comments immediately following this discussion also show that Article 119 was specifically considered to be the means for the prosecution of vehicular homicides, and that such prosecutions would be based on *culpable*, not simple negligence:

> Mr. Elston. He has to be violating the law. Suppose he is only violating a city ordinance. You cannot predicate it [involuntary manslaughter] ordinarily on the violation of a city ordinance unless it is in those states where they recognize *culpable negligence* as being the basis for manslaughter?
>
> Mr. Larkin. Yes; *where you have those automobile homicides.*
>
> Mr. Elston. *Yes.*

Id. at 1248, *reproduced at* Appendix C, p. 26a (emphasis added).

Further indications that Congress rejected the idea that criminal homicides could be based upon a simple negligence standard may be found in Congress' resolution of the conflict between the position of the Army and the Navy on the scope of their respective general articles. The drafters of the UCMJ recognized that conflicts existed and determined to resolve *all* such conflicts. H.R. Rep. No. 491, 81st Cong., 1st Sess. 35 (1949); S. Rep. No. 486, 81st Cong., 1st Sess. 32 (1949). One way this was done was to make specific offenses out of conduct which had been treated under the old general articles. *House Hearings*, pp. 1238-39, *reproduced at* Appendix C, pp. 5a-8a. In the case of homicide, the drafters of the UCMJ referred in proposed Article 119 to the Navy provision which indicated that only manslaughter, and *not* negligent homicide, could be prosecuted under their general article. *See* House Hearings, p. 1232 (referring to Naval Courts and Boards (N.C. and B.),

section 119). Significantly absent is any reference to or approval of the novel Army approach of prosecuting negligent homicide under the general article.

Several important conclusions flow from this legislative history. First, Congress deliberately set out to explicitly codify the degrees of homicide which would be recognized under the UCMJ. Second, the drafters recognized that under the UCMJ, some crimes which had been laid under the Army or the Navy's general article would henceforth be prosecuted under a specific article. Third, criminal homicides were among these crimes. Fourth, a deliberate choice was made to select a standard which did not recognize homicides resulting from simple negligence. Negligent homicide then, to the extent it ever was properly chargeable as a crime under the Articles of War, did not survive the adoption of the UCMJ in 1950.

II. THE UNITED STATES COURT OF MILITARY APPEALS HAS NOT CORRECTLY APPLIED THE PRINCIPLES OF STATUTORY CONSTRUCTION TO DETERMINE CONGRESSIONAL INTENT.

The U.S. Court of Military Appeals has discussed the intent of Congress to "cover the field" of homicide under Articles 118 and 119 only in *United States v. Kick*, 7 M.J. 82 (CMA 1979) (*reproduced at* Appendix D, pp. 36a-50a).[7] In *Kick*, a 2-1 decision with a strong dissent by Judge Matthew Perry,[8] the court refused to recognize the applicability of preemption to homicide crimes under Article 134. The court reasoned that, prior to the adop-

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[7] The Court of Military Appeals summarily affirmed petitioner's conviction on the basis of *Kick*. That court had also ruled in a much earlier case, United States v. Kirchner, 1 USCMA 477, 4 CMR 69 (1952) that negligent homicide could be charged under Article 134. However, the *Kirchner* court did not address the preemption doctrine.

[8] Judge Perry currently sits as a United States District Judge for the District of South Carolina.

tion of the UCMJ, negligent homicide had been prosecuted by the Army under its general article, and found itself "reluctant to conclude that Congress intended these provisions to preempt this offense from the spectrum of punishable criminal homicides in the absence of a clear showing of a contrary intent either in the language of these codal provisions or their legislative history." *United States v. Kick, supra* at 85. The Court of Military Appeals' resolution of this issue is plainly wrong and inconsistent with the comprehensive and detailed treatment of homicide in Articles 118 and 119, the clearly expressed concern of the congressional subcommittee over the limits and parameters of the homicide offenses they were creating, and the deliberate decision to resolve the conflict between the Army and Navy's treatment of homicide in favor of eliminating negligent homicide.

The lower court's analysis also ignores several other relevant principles of statutory construction. First is the familar rule that ambiguity concerning the scope of criminal statutes ought to be resolved in favor of lenity. *Busic v. United States*, 446 U.S. 398, 406 (1980). Second is the principle that courts should be reluctant to give a statute a construction which makes it wholly redundant, absent a clear legislative purpose to do so. *Singer v. United States*, 323 U.S. 338, 344 (1945); *see Platt v. Union Pacific Railway Co.*, 99 U.S. 48, 58 (1878) (the legislature is presumed to have used no superfluous words). Complementing this principle is the canon *expressio unius est exclusio alterius* and the general rule that precedence is given to a specific statute over a more general one. *Preiser v. Rodriguez*, 411 U.S. 475, 489-90; *United States v. Kick, supra* at 89 (Perry, J., dissenting). In the present case, had Congress not wished to restrict the reach of Article 134, there would have been no need for Articles 118 and 119. Congress could simply have specified the two types of murder for which the

death penalty would be authorized [9] and left the remaining homicide areas untouched or merely restated the prior law under the Articles of War and the Articles for the Government of the Navy. However, this is not a case where Congress merely reenacted prior law as it found it, without change. Instead, Congress gave explicit, detailed treatment to the question of homicide and the extent of criminal liability in this area. The comprehensive treatment of homicide in Articles 118 and 119 would be totally redundant if military authorities are free to ignore the minimum standards of culpability established by the legislature and create lesser homicide offenses under the general article.

Moreover, the *Kick* court's conclusion that Congress must have been aware of and implicitly approved of the prosecution of negligent homicide under Article of War 96 rests upon a faulty premise. Negligent homicide had not been long entrenched as a crime under Article of War 96 with a considerable history of application in a variety of settings. Instead it was a creature of dubious origin and uncertain parentage. Neither the Army nor the Navy apparently recognized such an offense before World War II. *See* Larkin & Munster, *Negligent Homicide in Military Law*, 46 *Cal. L. Rev.* 782 (1958). The *Manual for Courts-Martial, United States Army* (1928) contains no mention of the offense, and as late as 1943, Army authorities rejected the concept that criminal liability attached to an accidental death caused by simple negligence. *United States v. Vislan*, 25 B.R. 349 (ABR 1943) (Appendix E).

Negligent homicide first appeared in military law in 1944, when an Army Board of Review considered the

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[9] The death penalty may not be imposed under the general article. The UCMJ permits the imposition of the death penalty only for offenses 'expressly made punishable by death." Article 52(b)(1), Uniform Code of Military Justice, 10 U.S.C. § 852(b)(1) (1982).

court-martial appeal of Second Lieutenant Francis G. Groat. *See United States v. Groat*, 34 B.R. 67 (ABR 1944) (Appendix F). Lieutenant Groat had been charged with involuntary manslaughter after an automobile accident in which the car he was driving killed a pedestrian. Despite ample evidence that Groat was intoxicated at the time, the court-martial excepted from the charge and specification all language indicating that Groat had acted unlawfully or in a grossly negligent manner, and found only that he "negligently" killed the pedestrian. On appeal, the Army Board of Review recognized that the findings of the court-martial would not support a conviction for manslaughter. However, two imaginative members of the Board found, over dissent and without citing *any* authority, that the findings showed "a neglect to good order and military discipline" which could be prosecuted under Article of War 96. After this auspicious beginning, the Army (and later, the Air Force) treated the offense as a general article violation, with each case furnishing precedent for the next. *See United States v. Kirchner*, 1 USCMA 477, 4 CMR 69 (1952).

The Manual for Courts-Martial, U.S. Army (1949) included a sample specification at Appendix 4, but the elements of the offense and a separate discussion were not published until the issuance of 1969 Manual for Courts-Martial. *See* para. 213*f*(12), *Manual for Courts-Martial, United States, 1969 (Revised edition)*.

Thus, as Congress began considering the UCMJ, the only precedent supporting negligent homicide as a military offense had not yet celebrated its fifth birthday. Congress approved no long-standing interpretation of Article of War 96 when it adopted the UCMJ and incorporated the traditional authority which did not recognize negligent homicide, instead of this novel Army approach. Rather than the *sub silentio* approval which the *Kick* court found, it is apparent that Congress, by

enacting detailed and specific homicide provisions in Articles 118 and 119 to replace the prior very general homicide articles, sought to arrest any development of previously unknown offenses rather than implicitly endorsing them.

III. THIS PETITION PRESENTS AN IMPORTANT FEDERAL QUESTION ON THE MISUSE OF THE GENERAL ARTICLE OF THE UNIFORM CODE OF MILITARY JUSTICE.

The potentially unlimited sweep of Article 134 has troubled courts and in the recent past led to extensive litigation in the federal courts. *See, e.g., Levy v. Parker*, 478 F.2d 772 (3d Cir. 1973), *rev'd*, 417 U.S. 733 (1974); *Avrech v. Secretary of the Navy*, 155 U.S. App. D.C. 352, 477 F.2d 1237 (1973), *rev'd*, 418 U.S. 676 (1974). In reversing these decisions of the lower courts, this Court recognized the crucial role that military appellate court decisions, along with military custom and tradition, play in restricting the general article and establishing parameters recognizable by servicemembers. *Parker v. Levy*, 417 U.S. 733, 752-54 (1974).

Petitioner's case presents a third, even more important consideration—recognition of the congressional role when courts consider the scope of the general article. The introductory phrase to Article 134, "[t]hough not specifically mentioned in this chapter" traditionally limits the operation of the general article where Congress has specifically delineated the elements of an offense in a particular section of the UCMJ:

> [*W*]*hen offenses and crimes are not given in terms or by definitions* the want if it may be supplied by a comprehensive enactment, such as the 32d article of the rule of the government of the navy, which means that *courts-martial have jurisdiction of such crimes*

> *as are not specified*, but which have been recognized to be crimes and offenses by the usages in the Navy of all nations . . .

Dynes v. Hoover, 61 U.S. (20 How.) 65, 82 (1857) (emphasis added); *see also* W. Winthrop, Military Law and Precedents 725 (2d ed. 1920); *United States v. Kick*, *supra* at 88 (Perry, J., dissenting). The limitations and clarifications of the scope of Article 134 contribute a vital foundation for the constitutionality of the Article. *See Parker v. Levy*, *supra* at 752-54 (commenting upon the clarification of Articles 133 and 134 by military courts and authorities). Perhaps the most important of these limitations are the ones placed, either explicitly or implicity, by congressional action.

The decision below indicates that the military may circumvent a clearly expressed congressional intent by adroitly manipulating the indeterminate standards of the general article. Congress enacted the UCMJ with both the intention and understanding that it would distill and refine the amorphous, generalized homicide crimes found in the Articles of War and the Articles for the Government of the Navy, and specifically graduate the various levels of criminal homicide under the UCMJ. If homicide crimes may still be invented under the general article, this Congressional effort had absolutely no purpose.

IV. PETITIONER IS PREJUDICED BY THE DECISION OF THE COURT BELOW.

Contrary to congressional intent and to the basic requirements of due process, petitioner has been subjected to prosecution for acts which do not and should not amount to criminal misconduct. But for the Army's disregard for the clear purposes of Articles 118 and 119, UCMJ, petitioner and others similarly situated would not suffer the deprivations occasioned by such unwarranted exercises of court-martial jurisdiction. Justice re-

quires that the application of Article 134 be properly limited to those crimes proscribed by the will of Congress and as this Court has approved in *Parker v. Levy, supra.*

CONCLUSION

This case presents a fundamental issue concerning the application of the general article established by Congress in the Uniform Code of Military Justice. Where Congress has specifically and comprehensively defined criminal conduct in a particular area, military authorities should not be able to create crimes under Article 134 merely by ignoring one or more of the elements which Congress has made a prerequisite to criminal liability. For these reasons the petition for certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 50617/AR

CMR Dkt. No. 443478

UNITED STATES,

v. *Appellee*

JOHN SPICER, JR. (158-56-2966),
Appellant.

ORDER

Upon consideration of the petition for grant of review in the above-entitled case, it is by the Court this 23rd day of April, 1985

ORDERED:

That said petition is granted on Issue I raised by appellate defense counsel; and

That upon further consideration of the granted issue in light of *United States v. Kick*, 7 M.J. 82 (C.M.A. 1979), the decision of the United States Army Court of Military Review is affirmed.

For the Court,*

/s/ JOHN A. CUTTS, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army

Appellate Defense Counsel (FEENEY)

Appellate Government Counsel (McCARTHY)

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* Judge FLETCHER did not participate.

APPENDIX B

UNITED STATES ARMY COURT OF MILITARY REVIEW

Before
MOUNTS, YAWN and WERNER
Appellate Military Judges

CM 443478

HQ, USA Air Defense
Center & Fort Bliss

W.J. Hemmer,
Military Judge

UNITED STATES,

Appellee,

v.

Private First Class
JOHN SPICER, JR.,
SSN 158-56-2966
United States Army,

Appellant.

Captain Joel R. *Maille*, JAGC, argued the cause for the appellant. With him on the brief were Colonel William G. Eckhardt, JAGC, Colonel R. Rex Brookshire II, JAGC, Lieutenant Colonel Arthur L. Hunt, JAGC, Major Robert M. Ott, JAGC, and Captain Michael T. Kelly, JAGC.

Captain Edmond R. McCarthy, Jr., JAGC, argued the cause for the appellee. With him on the brief were Colonel James Kucera, JAGC, Lieutenant Colonel John T. Ed-

wards, JAGC, Major Patrick M. Flachs, JAGC, and Captain Daniel N. Velling, JAGC.

21 May 1984

MEMORANDUM OPINION

Per Curiam:

The appellant, contrary to his plea, was found guilty of negligent homicide, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. 934. His approved sentence provides for a bad-conduct discharge, confinement at hard labor for 335 days, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade.

While driving on Fort Bliss, the appellant swerved onto a sidewalk, thereby hitting and killing Colonel L., who had been jogging with his wife. The appellant's car continued down the sidewalk, knocked down two signposts, and returned to the street. The appellant drove for a few more blocks and then returned to the scene.

In a pretrial statement admitted at his trial, the appellant contended that as he was driving he saw two joggers and started to change lanes to avoid them. He hit a bump, his eyes blurred, he hit the brake, and the car swerved to the right. After the car hit Colonel L., the appellant panicked and accidently stepped on the accelerator rather than the brake pedal.

Mr. Oscar T. Silva, the Motor Pool Maintenance Foreman, testified that he had tested and inspected the appellant's automobile and had discovered nothing wrong with the braking or steering mechanisms.

We find that the appellant's act of driving onto the sidewalk under the circumstances of this case was at least

simple negligence and the proximate cause of Colonel L.'s death. We therefore find that the Government has provided sufficient evidence to prove the appellant guilty of the charge beyond a reasonable doubt.

Appellate defense counsel have given the Court an outstanding brief and oral argument urging that we now hold that negligent homicide has been preempted by the homicide offenses prescribed by Articles 118 and 119, Uniform Code of Military Justice. We have carefully considered their excellent arguments but find that the weight of authority is appropriately in favor of continuing negligent homicide as a separate offense under Article 134, Uniform Code of Military Justice. *United States v. Kick*, 7 M.J. 82 (CMA 1979); *United States v. Kirchner*, 1 U.S.C.M.A. 477, 4 C.M.R. 69 (1952).

The findings of guilty and the sentence are *AFFIRMED*.

FOR THE COURT:

/s/ William S. Fulton, Jr.
WILLIAM S. FULTON, JR.
Clerk of Court

APPENDIX C

Hearings on H.R. 2498 Before a Subcommittee of the Committee on Armed Services, 81st Cong., 1st Sess. (1949), pp. 1238-53

Mr. LARKIN. . . .

The civil crimes in the Articles of War, as defined by the manuals, were generally the definitions in the common law, actually the common law of Maryland which, as a matter of fact, is very close to the Federal law definitions but is not identical.

* * * *

The civil crimes in the Articles for the Government of the Navy were not defined, except that Naval courts and boards generally followed the Federal statutory definition; but to the extent that they provided some common law crimes which had never been made statutory, they followed the common law definition. There was enough variance, however, to lead us to the conclusion that since we were trying to draft punitive articles for the three services, we ought to define all of the offenses, and the civil crimes, as I have said, not having been defined in the statute before.

So we started from scratch and we examined each offense and tried to stick as closely as we could to the definition that was commonly used by both services and also to adopt whatever ideas we felt were worth-while from some of the more modern State codes. We considered adopting the Federal definition as defined in the Federal code, but, unfortunately, we found there were some offenses that were not defined there, either.

So we looked to all of these sources and relied on most of them and tried to select what we thought was the clearest definition for each of those offenses, sticking as closely as we could to what was commonly used as a definition by both of the services now or what was the latest definition in some of the more modern day penal laws.

In addition to that, we set out in the punitive articles in the beginning some general definitions which had heretofore not been statutory but which are set out in most of the modern penal codes. For instance, we drafted one definition for principals, for accessories after the fact, and for a provision of lesser included offense, for attempts and for conspiracy.

Mr. DEGRAFFENREID. You really, in effect, have done away with the distinction between principals and accessories before the fact, have you not?

Mr. LARKIN. That is right; we have—and also a definition of solicitation. We have spelled those out in the code where heretofore they have not been in the Articles of War or Articles for the Government of the Navy and then have gone on with each of these crimes, keeping the major crimes that we found in each of the services and adding a few—I think just two—additional offenses which were not found before.

That was the general scheme which we followed.

If you care to address yourself to any individual definition of any offense, I will try to point out the source of it or point out the previous definition as used in either the Articles of War or the Articles for the Government of the Navy or both.

Mr. BROOKS. I would like to ask you this: suppose an offense is not defined under these punitive articles, is there any redress by court martial?

Mr. LARKIN. We have retained a general article, Article No. 134, which is similar to Article of War No. 96, and the Article for the Government of the Navy No. 22, so that offenses of—

> disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces—

is retained as it was provided in the Articles of War and in the Articles for the Government of the Navy. We have in a few instances made specific offenses out of conduct which heretofore was treated only by this general order, but otherwise it is the same.

We also have retained Article of War No. 95 and made it Article No. 133. That is conduct unbecoming an officer and a gentlemen.

Mr. ELSTON. What do you mean in section 134 when you say "and crimes and offenses not capital, of which persons subject to this code may be guilty"? I will go back a little further and start from the beginning.

Though not specifically mentioned in this code, all disorders and neglects to the prejudice of good order and discipline in the Armed Forces, or conduct of a nature to bring discredit upon the Armed Forces, and crimes and offenses not capital, of which persons subject to this code may be guilty * * *.

To what crimes and offenses are you referring there—the ones defined in this code or other crimes and offenses?

Mr. LARKIN. It has been construed to be the offenses which are not spelled out but which are offenses under the Federal law. It is the same provision as is now found in article 96. Also, as Colonel Dinsmore reminds me, it may be an offense under a State law where the accused commits such an offense in that State.

Mr. ELSTON. So, as I understand it, any person in the military service who commits an act which is defined as a crime by a Federal or State law is subject to trial and punishment in the military courts for the commission of that offense?

Mr. LARKIN. That is right.

Mr. BROOKS. Going further, if a soldier, for instance, is out here in Washington and speeds, the military has full authority to punish him for speeding?

Mr. LARKIN. If it is an offense; yes.

Mr. BROOKS. Well, speeding is an offense in Washington.

Mr. LARKIN. I do not know. Sometimes it is a violation of an ordinance; it is not classified as an offense. But that would depend——

Mr. BROOKS. This would not be construed, then, to cover a violation of a city ordinance?

Mr. LARKIN. I do not believe so.

Colonel DINSMORE. I do not think so, Mr. Chairman.

Mr. BROOKS. But only a statutory offense; is that it?

Mr. LARKIN. The construction as to State laws should be clarified to this extent: I believe a violation of a State law would be punishable under the code to the extent it is construed as conduct to the prejudice of good order and discipline but not to the extent of the specific State law itself. We purposely want to avoid personnel who happen to commit an offense under State law, by virtue of the tremendous variations between State laws and by virtue of the necessity that would fall upon the court of trying them according to the procedural practices and perhaps even the substantive provisions of one State as against another. But, if the act is to the prejudice of good order and discipline, the fact that it also incidentally is a State law violation as well would bring it under this jurisdiction but not triable as the State would try it.

Mr. ELSTON. It would necessarily include all cases involving moral turpitude.

Mr. LARKIN. I should say so; yes.

Mr. ELSTON. I am wondering where you got your definition of principals and the manner in which they should be punished.

Mr. LARKIN. That came I believe from title 18 of the United States Code section 2. The only variation from that definition there is that in title 18, section 2, after these words, there are the additional words "is a principal." And by virtue of the fact that we were trying to word this as we did in the first sentence to include spies, for instance, who are not subject ordinarily to the code, we revised it a little and it was criticized I think by some witness—I believe Mr. L'Heuseux. Where it says "any person punishable under this code who commits an offense punishable," that seems to be redundant. But we consciously did it that way rather than saying "any person subject to this code who commits an offense punishable," because spies are not otherwise subject to this code. But, to answer your question specifically, it comes from the Federal Code.

Mr. ELSTON. The words "shall be punished with the punishment provided for the commission of the offense," does that come from the Federal Code?

Mr. LARKIN. The Federal Code says "as a principal," which means the same same thing.

Mr. ELSTON. I do not know whether it does or not. You limit the punishment of a principal or an accessory before the fact to the punishment provided for the commission of the offense that he aided another to commit.

Mr. LARKIN. That is right.

Mr. ELSTON. The law goes further than that. Suppose he aided someone to commit the crime of robbery and in the perpetration of the robbery a murder is committed; he not only should be punished for the offense that he aided the other to commit, but for any offense which might reasonably be expected to flow from the commission of the act intended.

Mr. LARKIN. He aids in the commission of a robbery, and murder flows from it. The person who com-

mitted, or who was the active agent in the robbery I assume becomes the one who commits the murder, and the accomplice is the principal for all purposes in the act of the active participant and, as such, he is a principal in the murder.

Mr. ELSTON. You do not say that, though. You say "shall be punished with the punishment provided for the commission of the offense."

Mr. LARKIN. Which in that case is murder.

Mr. ELSTON. But read up above. You say:

Any person punishable under this code who—

> (1) commits an offense punishable by this code, or aids, abets, counsels, commands, or procures its commission;

It seems to me you have got to go a little further than that or you are going to limit an aider or abetter to the offense, committed, the offense that he aided another to commit, where he did not intend to commit the crime of murder, and intended only to commit the crime of robbery. He may have been a mile away from the scene of the crime; he may have furnished the weapon that was to be used in the commission of the robbery, but murder was committed, something that he did not intend. He may have advised against it but still, under the law, he would be guilty, because murder is something that might reasonably be expected to flew from the commission of the act that he thought was going to be committed.

Mr. LARKIN. Is that not true of the active principal who starts out with no intention of committing a murder but with the intention of committing a robbery and without intention to commit a murder, but, during the commission of the robbery, does so commit the murder?

Mr. ELSTON. That is understandable as to him; but the person who aided and abetted is limited, as your lan-

guage seems to limit it, and might be punished only for the offense that he conspired to commit.

Mr. LARKIN. Of course, a conspirator is bound by all the acts of his conspirators; is he not?

Mr. ELSTON. That is the theory of the law, but is it expressed here anywhere?

Mr. DEGRAFFENRIED. Mr. Larkin, is it true generally, under Federal law, that if a man were to plan, for example, with his confederates to break into a filling station at night and steal money from the cash register, but did not go with them to do it; but that when the crime was committed the night watchman, or somebody else, happened to come up and was killed by one of the people present, is it true under Federal law that that man, who is not on the scene of the crime, would be guilty of murder?

Mr. LARKIN. If you can prove he is part and parcel of the conspiracy, I think so. Is not analogous to the case that where a principal or his instigator of a crime, or a procurer of a crime, hires a paid gunman, let us say, to go out and commit robbery, and he is not near the scene at all?

Mr. BROOKS. Gentlemen, I do not believe we can finish this before lunch. I am therefore going to suggest that we recess until 2 o'clock. Mr. Smart, for instance, has about 8 or 10 inquires about these articles that should be covered.

Mr. LARKIN. Let us reserve judgment on that, Mr. Elston, and look up some of those cases. We shall try to do it very quickly. And, if it is not clear, I agree that we ought to correct it.

Mr. ELSTON. It is a very simple definition. Whoever aids, abets, procures another to commit an offense shall be charged and tried as a principal offender.

You have got them all, then.

Mr. BROOKS. If there is no objection, we shall recess until 2 o'clock.

(Whereupon the subcommittee took a recess until 2 p.m.)

AFTERNOON SESSION

The subcommittee reconvened at 2 p.m., Hon. Overton Brooks (chairman) presiding.

Mr. BROOKS. The committee will please come to order.

Mr. Larkin, since we recessed, have you and Mr. Smart gotten together on some suggestion of changes or interpretations of the articles?

Mr. LARKIN. Well, the one we were discussing, Mr. Chairman—namely, 77—I think would be cured or at least would meet the idea Mr. Elston had if we added the words, in line 80, page 65, "is a principal" and strike out the rest of the language on lines 8 and 9.

But I think, since Mr. Elston raised the point, perhaps we ought to reserve the suggestions until he returns; and, if it meets with his approval, why I think—

Mr. BROOKS. We might wait a little bit. Suppose we do this: Take up the other articles and then come back to his suggestion before we adjourn.

Mr. LARKIN. Fine.

Mr. BROOKS. I think Mr. Elston told me he would be a little late.

Mr. LARKIN. All right.

Mr. BROOKS. But I think he will be right back.

Mr. SMART. Mr. Chairman, in view of the previous decision of the committee to more or less consider these punitive articles en bloc, I have no further questions up to article 106, which I think needs clarifying as to the meaning of the word "lurking" on page 77, line 3.

I find that the intent was that the word "lurking" would mean "lurking as a spy." So I would suggest an amendment on line 3, page 77, after the word "lurking," insert "as a spy."

Mr. BROOKS. So it will read: "Any person who in time of war is found lurking as a spy"?

Mr. SMART. Yes, sir.

Mr. LARKIN. "or"—

Mr. BROOKS: "or acting as a spy"?

Mr. SMART. That is right. There is some doubt as to the advisability of striking out the word "lurking," because it has historical significance and has been in the military law for many, many years.

This would definitely clarify the meaning of the word "lurking."

Mr. BROOKS. Is there any objection to that? I do not believe there is.

Mr. DEGRAFFENRIED. No.

Mr. BROOKS. If there is no objection, then we will adopt that suggested amendment.

Now, is there any other comment on 106? Are there any comments on any of these other articles covering punitive provisions of the code?

Mr. DEGRAFFENRIED. There is just one question I would like to ask as a matter of information.

Mr. Larkin, do you have anything in military law at all that provides in any kind of serious case that an accused cannot be convicted on the uncorroborated testimony of an accomplice?

Mr. LARKIN. There is nothing in the statute that I know of.

Mr. DEGRAFFENRIED. We talk about these accessories and all, and I just wondered in a lot of jurisdictions that protection is thrown around the accused.

Mr. LARKIN. Captain Woods points out in the Navy they have heretofore provided that the uncorroborated testimony of an accomplice, for instance, is not sufficient. I would anticipate that that same rule will be preserved and continued in the uniform manual.

I believe it is the Federal rule and we tried to adhere as nearly as possible to that rule.

Colonel DINSMORE. Mr. Chairman, my recollection, and I speak subject to correction, is that our rule is that he may be convicted on the uncorroborated testimony of an accomplice but that such testimony will be received with great caution.

Mr. DEGRAFFENRIED. That is all.

Mr. BROOKS. Any further questions?

Now, someone was telling me the other day, perhaps it was you Mr. Larkin, about a case arising in New York in which it was found, I think on a habeas corpus, that the service had no law to cover some very serious crime.

Do you recall that?

Mr. SMART. I think that is a Navy situation. I think that was a case which arose on one of the overseas islands where several sailors committed a murder.

In that situation, they were not attached to a ship and were not subject to capital punishment.

Captain WOODS. Is that the Saipan case?

Mr. SMART. Yes.

Captain WOODS. Yes. The point was that our code provided that jurisdiction over murder pertained to outside the continental United States when attached to the ship.

These people were ashore and therefore we could not try them for murder.

So we had to retry them for manslaughter.

Mr. BROOKS. Now, is there anything in this code that takes care of that situation?

Captain Woods. That takes care of it?

Mr. BROOKS. Under what article is that? That might be asked us on the floor.

Mr. SMART. That is article 118. "Murder." It does not restrict it as far as the territorial applicability of the code is concerned.

The code provides that it will be applicable in all places, so that covers ships, islands, continents, or whatever you have.

Mr. BROOKS. Mr. Elston has come in. We might turn back to that one particular matter that we were discussing, Mr. Larkin, and take that up and see whether or not your suggestion fits the situation now.

Mr. LARKIN. Well, as I pointed out, Mr. Chairman, I think this article if amended as follows——

Mr. BROOKS. What article is that, now?

Mr. LARKIN. Article 77, on page 65 will include the idea expressed by Mr. Elston. That is, on line 8, strike out all the words on that line and also on line 9 and substitute the words, "is a principal."

Mr. ELSTON. I do not quite get that. Where is that?

Mr. LARKIN. Page 65, Mr. Elston.

Mr. ELSTON. I have that.

Mr. LARKIN. Line 8.

Mr. ELSTON. Yes, strike everything on line 8 and 9.

Mr. LARKIN. Yes, everything on lines 8 and 9?

Mr. ELSTON. Yes. So that starting with (2), it will say "causes an act to be done which if directly performed by him would be punishable by this code" and then drop to the next line, "is a principal."

So that in all those cases above he is a principal.

Mr. BROOKS. You do away with accessories completely?

Mr. LARKIN. No, sir. We just add to the end of that, "is a principal," which includes accessories before the fact.

Mr. BROOKS. Sure. I see what you mean there.

Mr. LARKIN. I think that cures the situation you had in mind, Mr. Elston.

Mr. ELSTON. That is all right: "or shall be punished as a principal offender"; either one.

Mr. LARKIN. Well, I think this one does it, do you not think so?

Mr. ELSTON. "Is a principal" reaches it.

Mr. BROOKS. Let me ask you, then: It take in all cases of accessories before the fact?

Mr. ELSTON. That is right.

Mr. BROOKS. And 78 merely covers those after the fact?

Mr. ELSTON. That is right. We have obliterated the distinction between the accessories before the fact and the accomplice on the scene.

Mr. BROOKS: Any further comment on that particular article?

Is there not a new article on larceny or are there some changes in the old article on larceny?

Mr. SMART. That is article 121, Mr. Chairman.

Mr. BROOKS. Have you any comments you want to make on that?

Mr. LARKIN. Well, it has been observed, I believe, that it is not clear whether larceny under the provision of article 121 applies only if the intent to defraud or deprive a person of his property is a permanent deprivation.

I think that is perfectly true. It does not have to be a permanent one. It could be a temporary one as distinguished from permanent.

Mr. BROOKS. Would you say it takes in the case of embezzlement?

Mr. LARKIN. It does. The reason for this draft is to obliterate the distinction between larceny by trespass and trick and device and embezzlement and false pretenses.

Now, last year, in Public Law 759, this committee in its amendment to article of war 93, did erase the distinction between larceny and embezzlement. They did not go further and provide for false pretenses. This is an attempt to obliterate the technical distinction between not only larceny of both kinds, that is, trespass and trick and device, but embezzlement and false pretenses as well.

Since such a comprehensive article had not been defined in the statute of either the articles of war or the articles for the government of the Navy, nor was it defined by your committee last time we were of course forced to adopt a definition which we thought would do that.

Mr. BROOKS. But you have nothing here which indicates a crime of grand larceny?

Mr. LARKIN. No, sir.

Mr. BROOKS. As contrasted to petty larceny?

Mr. LARKIN. That is right. The military law has not had degrees of larceny in the fashion of civil courts

where you have grand larceny in the first or second or third degree, depending upon the amounts.

Mr. BROOKS. Any questions, Mr. Elston?

Mr. ELSTON. Of course, you leave it to the court martial to affix such punishment as the court martial may direct?

Mr. LARKIN. Exactly.

Mr. SMART. That is further limited, Mr. Elston, by your table of maximum punishments which prescribes that for property taken in such and such a value you will have a given maximum punishment. So it very closely follows, I think, the civilian concepts of petite larceny and grand larceny.

Mr. DEGRAFFENRIED. Mr. Larkin, under the construction placed by the military authorities on false pretense, is that construed that there must be a statement of an existing fact that is false that causes a person to be deprived of his property or can a mere promise to do something which he fails to do support false pretense?

Mr. LARKIN. I would have to look that up. I know in civil law it usually always is an existing fact rather than a promise.

Mr. ELSTON. Past or an existing fact.

Mr. LARKIN. Past or existing. That is right.

Mr. DEGRAFFENRIED. Well, that is not important enough to cause you any delay here.

Mr. LARKIN. I will look it up. But I am sure the past or existing fact rule applies.

Mr. ELSTON. Are you through, Mr. deGraffenried?

Mr. DEGRAFFENRIED. Yes, Mr. Elston.

Mr. ELSTON. Of course, you eliminated one of the elements of embezzlement, which is agency.

Mr. LARKIN. The fact that a clerk or an employee has lawful custody and then thereafter appropriates to his own use wrongfully with the intent to deprive is the same, I should say, under this, as it is under embezzlement.

Mr. ELSTON. Well, of course, in order to convict of embezzlement there has to be not only agency but the property must have come in to his possession by virtue of his agency.

The mere fact that he is employed by the Government or the fact that some property came into his possession would not make him guilty of embezzlement unless it came into his possession by virtue of his agency.

To illustrate what I mean: Say a man is a cashier. If property came into his possession as cashier and he appropriated to his own use he would be guilty of embezzlement.

But if he went across the aisle and appropriated money from some other cashier's cage he would not be guilty of embezzlement but larceny.

Mr. LARKIN. That is right. But the question of agency hinges on the fact, does it not, that the custody he has over it is a lawful one? Whether it is a full-blown agent or whether it is an agent for purposes of custody is immaterial. It is the lawful custody.

Mr. ELSTON. Well, of course you can put any definition in that you want.

Mr. LARKIN. That is right.

Mr. ELSTON. But you are including three offenses in one: Larceny, embezzlement and obtaining property by false pretenses?

Mr. LARKIN. That is right.

Mr. ELSTON. And perhaps conversion also?

Mr. LARKIN. Yes.

Mr. SMART. This includes joy riding.

Mr. LARKIN. Yes, under this section a person who would drive the automobile of another, and not intend to steal it at all but just drive it, without consent of the owner, would be guilty under article 121.

Mr. LARKIN. That is right.

Mr. SMART. In that particular instance, Mr. Elston, the punishment will be limited in the table of maximum punishments, in the case of joy riding.

Mr. ELSTON. Well, I appreciate in military offenses you do not have to be as specific as you do in the civil courts because the statute in each case defines the penalty.

Mr. LARKIN. That is right.

Mr. ELSTON. Here you have a table of punishment which is to be construed in connection with the statute and I suppose you can put anything in the statute you want.

Mr. LARKIN. May I point out the present table of maximum punishments in connection with larceny provides that if it is concerned with property of the value of $20 or less the maximum punishment is 6 months.

In the event that it is concerned with property of a value of $50 or less and more than $20 the maximum is a year. And if it is concerned with property of the value of more than $50 the maximum is 5 years.

Mr. BROOKS. Did we put those tables of punishment in the record?

Mr. LARKIN. Well, you could. But they are to be drawn and provided as is the whole manual, by article—

Mr. BROOKS. Why would it not serve a good and useful purpose to put the tables in? They are not very long, are they?

Mr. LARKIN. Well, they are.

Mr. BROOKS. Well, never mind.

Mr. SMART. There are several pages, Mr. Chairman.

Mr. LARKIN. There are more than that.

They are to be provided, as you will recall, under the article where the President prescribes.

Mr. BROOKS. Sure.

Any further questions?

Any further comments from either you, Mr. Larkin, or you, Mr. Smart, on these articles?

Mr. LARKIN. No, sir.

Mr. ELSTON. Mr. Chairman, I would like to go back to article 119 which defines manslaughter. It says:

Any person subject to this code who, without a design to effect death, kills a human being in the heat of sudden passion or by culpable negligence or which perpetrating or attempting to perpetrate an offense, other than specified in paragraph (4) of article 118, directly affecting the person, is guilty of manslaughter and shall be punished as a court martial may direct.

Now, what about an intentional killing while the slayer is in the heat of passion? Here you say "without a design to effect death."

You have some types of manslaughter where it is with an intent to kill.

Mr. DEGRAFFENRIED. But where there is an absence of premeditation, deliberation, and malice.

Mr. BROOKS. And in the heat of passion.

Mr. LARKIN. Well, there are variations among the statutes on that point. It probably can be divided into two schools of thought. The first is where you have a

design to kill and it is preceded by premeditation and deliberation, which classically is common-law murder in the first degree.

Then you have the kind where you have the design to effect death and it is not preceded by premeditation and deliberation, which is usually murder in the second degree.

Mr. DEGRAFFENRIED. If malice is present.

Mr. LARKIN. You have murder, then, confined to those in which there is the intent to kill, that is, the design to effect death. Then you come to the next lower degree, if you will, and in this one school of thought, the heat of passion is such that it overcomes the intent to kill or negatives it so much that there cannot be said to be a design to consciously and intentionally effect death because of the disturbed state of mind in the heat of passion.

Mr. ELSTON. Well——.

Mr. LARKIN. Then you have a so-called voluntary type in the heat of passion and involuntary type by negligence and so forth.

Then there is of course the other grouping where you have the conscious intent and design to kill, whether, premeditated or otherwise, falling into murder in the first or second degree, or going forward (with the intent to kill in the manslaughter but the intent is so beclouded by the heat of passion that it is hard to say, even though you said it is an intent, the heat of passion has not removed entirely that intent because if you can clearly prove the intent to kill in an excited state but not in such a heat of blood or passion that it eradicated your intent, why, you would have been guilty of murder in the second degree rather than manslaughter in the first.

It is perfectly true that the different State jurisdictions have those "one or the other" styles. As a matter

of proof, I think, it ultimately comes down to exactly the same thing.

Mr. ELSTON. I do not know that it does. My understanding is that if you kill in the heat of passion or upon sudden or great provocation and do it intentionally it negatives malice.

Mr. DEGRAFFENRIED. That is right.

Mr. ELSTON. But still the intent to kill is there. Now, this definition confines it to an unintentional killing at all times. If there is an intentional killing it is not manslaughter. And there are plenty of cases of manslaughter where the killing is intentional.

Mr. LARKIN. But there is not a design to effect death.

Mr. ELSTON. What is the difference between a design to effect death and intent to kill?

Mr. BROOKS. The design is where you get your premeditation?

Mr. LARKIN. Not necessarily.

Mr. ELSTON. No.

Mr. LARKIN. You may have a design to effect death which is preceded by premeditation and deliberation, or not. It might be on the spur of the moment, a conscious, specific design to effect the death without previous premeditation.

The heat of passion, as I understand it, to reduce below murder in the second degree must preclude the design to effect death. Otherwise, it is murder in the second degree.

Mr. DEGRAFFENRIED. What do you think about this, Mr. Larkin: Murder in the first degree is the killing of a human being with premeditation, deliberation, and malice; murder in the second degree is the killing

of a human being with malice but without premeditation and deliberation; manslaughter in the first degree is the intentional, unlawful killing of a human being but without malice and without premeditation or deliberation.

Mr. LARKIN. Well, when you delete the malice from the intention, what have you done?

Mr. DEGRAFFENRIED. Well, the intent. You have the intent there.

Mr. LARKIN. You are intending an act mala in se and you say it is without malice?

Mr. DEGRAFFENRIED. Yes. The passion that you exist under at the time does away with the malice. You still have the intent to kill. But the heat of passion does away with the idea of malice and premeditation and deliberation.

Mr. LARKIN. Well, I cannot see the distinction.

Mr. ELSTON. I see the distinction. There are two grades of manslaughter, voluntary and involuntary, and your definition has completely ignored voluntary manslaughter where there is an intentional killing but there is no malice such as the killing of another in the heat of passion or upon sudden or great provocation.

Now, he intends to kill. There is not any question of an intent to kill. But he does not entertain malice. If he entertains malice, then it is second-degree murder and not manslaughter.

Mr. LARKIN. Well, it becomes a question of the proof, does it not?

Mr. ELSTON. Yes——

Mr. DEGRAFFENRIED. A jury——

Mr. ELSTON. But you have to find the crime, too, and if you want to include voluntary manslaughter,

which is made punishable in every State of the Union, I think you would have to change your definition.

Mr. LARKIN. Well, it is not made punishable in New York, specifically, as such. That distinction that I pointed out first, of a design to kill, distinguishes murder in the first and second degree from manslaughter in the first and second degree which is without a design but in the heat of passion.

Mr. BROOKS. Well, I might say in my State we do not have such a crime as murder in the second degree. The crime is murder or manslaughter. And if the jury brings in a verdict of murder it can bring in recommendations for clemency, which is as close as we come to murder in the second degree.

Mr. LARKIN. Yes. Well, you certainly have your choice there.

Mr. ELSTON. Well, it would seem to me that the proper definition of manslaughter would be:

Any person subject to this code who intentionally kills another in the heat of passion or upon sudden passion and without malice or unintentionally kills another by culpable negligence or while perpetrating or attempting to perpetrate an offense, other than those specified in paragraph (4) of article 118.

Of course, you ought to say "unintentionally." And you ought to say he unlawfully kills. It has to be an unlawful killing.

Mr. DEGRAFFENRIED. That is right.

Mr. ELSTON. You would not say that it was manslaughter to kill another unintentionally unless the slayer was violating the law.

Mr. LARKIN. Or by negligence.

Mr. ELSTON. Or by culpable negligence.

Mr. LARKIN. That is right.

Mr. ELSTON. He has to be violating the law. Suppose he is only violating a city ordinance? You cannot predicate it ordinarily on the violation of a city ordinance unless it is in those States where they recognize culpable negligence as being the basis for manslaughter?

Mr. LARKIN. Yes; where you have those automobile homicides.

Mr. ELSTON. Yes.

Mr. DEGRAFFENRIED. Some States hold that the doing of a lawful act. I do not know exactly how they define it.

Mr. LARKIN. I think a lawful act in an unlawful manner.

Mr. ELSTON. Or by unlawful means.

Mr. DEGRAFFENRIED. Yes.

Mr. BROOKS. What about that subsection (3), there, where a person intends to perpetrate a crime such as robbery but it results in unlawful killing?

Mr. LARKIN. That would be murder.

Mr. BROOKS. That would be murder?

Mr. LARKIN. That is right. Well, that is provided by (c): Robbery and the few other felonies we mention in article 118——

Mr. BROOKS. Oh, yes.

Mr. LARKIN. Would make it murder, whereas other——

Mr. BROOKS. You take it out of that group mentioned in subsection (4) and then it will be automatically manslaughter.

Mr. SMART. Yes.

Mr. ELSTON. I think you omitted one very essential element in manslaughter, too, in that his unlawful act must have been the proximate cause of his death.

Mr. SMART. I think that is a necessary ingredient.

Mr. ELSTON. It is probably not necessary in the definition?

Mr. SMART. That is right.

Mr. ELSTON. But I mention it since you do undertake to define the thing rather fully.

Mr. SMART. Yes.

Mr. ELSTON. I question your definition of murder too. You make it possible for a person to be guilty of murder in the first degree without even an intention to kill. You say [reading].

Any person subject to this code who without justification or excuse kills a human being when he is * * * engaged in the perpetration or attempt perpetration of burglary, sodomy, rape, robbery, or aggravated arson, though he has no intent to kill.

Mr. SMART. That is a felony murder.

Mr. ELSTON. I never knew you could be guilty of murder in the first degree without an intent to kill.

Mr. SMART. Well, it is a statutory crime.

Mr. ELSTON. Out in Ohio it is not. You have to have an intent to kill to be guilty of murder in the first degree. You have to have an intent to kill and you have to have malice. And you have to have premediation except in those cases where it is your intention to kill while perpetrating or attempting to perpetrate rape, arson, or burglary.

Mr. LARKIN. Well, it is a felony murder. That is the typical felony murder in certain other States. I do not know about Ohio, Mr. Elston.

Mr. ELSTON. Well, do you want to send a person to his death where he unintentionally kills?

Mr. SMART. During the course of a robbery.

Mr. BROOKS. Intent is presumed in that case, is it not?

Mr. ELSTON. You may presume an intention from the manner in which he commits his act, but you cannot presume it from the mere commission of the act.

Mr. SMART. You have to prove the intent to commit the underlying felony and during the course of the commission of that underlying felony death results.

Mr. ELSTON. Murder results if he intentionally causes the death or if his act is of such nature that an intent can be inferred.

And a person is presumed to intend the natural, reasonable and probable consequences of his voluntary act?

Mr. SMART. That is right.

Mr. ELSTON. But you cannot assume that he intended to kill unless the circumstances indicate that the execution of his crime might produce death.

Well, just take, for example, a man burns down an old cow shed. He does not anticipate that anybody is in the shed and it happens that a tramp is sleeping there.

Now, he is not guilty of murder in the first degree, as he would be if he burned a dwelling house or a place where people are accustomed to congregate?

Mr. LARKIN. I think that would follow here, would it not?

Well, we have to go to our definition of arson to determine that, but that covers a dwelling house in which people are likely to be and not a structure in which they are not likely to be.

Mr. ELSTON. Well, you just say, "arson." Arson is the unlawful burning of a building.

Mr. LARKIN. "Aggravated arson" we say, and we have a definition for aggravated arson.

You see, in 126 we provide that—

Any person subject to this code who willfully and maliciously burns and sets on fire a dwelling in which there is at the time a human being, or any other structure, water craft, or movable, wherein, to the knowledge of the offender, there is at the time a human being, is guilty of aggravated arson.

Now, that is the type of arson that is in the felony murder which would sustain a murder charge—not any other kind of arson.

Mr. ELSTON. Of course, you do not differentiate it with murder in the second degree here at all?

Mr. LARKIN. That is right.

Mr. ELSTON. Under this statute a person could be guilty of killing another without malice, without premeditation, and even without perpetrating or attempting to perpetrate rape, arson, robbery or burglary?

Mr. LARKIN. That is right. You see, the death penalty is not provided. The death penalty is provided only in subdivision (1), and then it is not mandatory.

Mr. ELSTON. Well, you do provide for imprisonment for life, though?

Mr. LARKIN. Subject to the maximum table. Well, one is the premeditated type of murder where it can either be the death penalty or imprisonment for life.

Mr. ELSTON. After reading it, you simply say that in section 1 he shall suffer death or imprisonment for life, as a court martial may direct.

In the others he is guilty of murder and shall suffer such punishment as a court martial may direct.

Now, does that not mean they could sentence him to death?

Mr. SMART. No.

Mr. LARKIN. They can sentence him to death only where it is specifically provided in the statute.

Mr. ELSTON. What is the court limited to, then? You say such punishment as the court martial may direct. What is the maximum?

Mr. LARKIN. What is set forth in the table of maximum punishments.

Mr. ELSTON. Well, what is that?

Mr. SMART. The maximum would be life.

Mr. LARKIN. Well, they would have to spell out what they are. I do not know that they have these separate subdivisions at the present time in the law.

Mr. ELSTON. Then under this definition you could not impose the death sentence if a person killed another while perpetrating or attempting to perpetrate rape, arson, robbery, or burglary?

Mr. LARKIN. That is right. It would be a felony murder. But you could not impose the death sentence.

Mr. ELSTON. Even though he intentionally killed?

Mr. LARKIN. Well——

Mr. SMART. Then you would revert to No. 1, I believe. You would revert to your premeditation.

Mr. ELSTON. You could have an intention to kill without a premeditated design to kill.

Mr. LARKIN. Then it would be under 2, would it not?

Mr. ELSTON. Yes; but under 2 you cannot impose the death penalty.

Mr. LARKIN. That is right.

Mr. ELSTON. You cannot impose it under 3 or under 4?

Mr. LARKIN. That is right.

Mr. ELSTON. You may have the most aggravated rape case in the world. A fellow may rape a 9-year old child and kill the child in the perpetration of his act and even do it intentionally, and if he did not do it with premeditation and deliberation which must exist for some period of time before the killing takes place, he could not be sentenced to death.

Mr. LARKIN. That is right. And he could not in a civil jurisdiction. It would be murder in the second degree.

Mr. ELSTON. Oh, no. In a civil jurisdiction if you have intent to kill plus the element of having killed while perpetrating any one of those felonies it would be a crime guilty of murder of the first degree?

Mr. LARKIN. That is right, but that would be on the theory of the felony murder, would it not?

Mr. ELSTON. Well, if he intentionally kills while perpetrating or attempting to perpetrate rape or arson, robbery or burglary without premeditation and deliberation, he is guilty of murder in the first degree and may be sentenced to death?

Mr. LARKIN. That is right.

Mr. BROOKS. Now, in most civil jurisdictions, anyway, where you have the crime of rape you have the death penalty.

Mr. SMART. You have in this code, in article 120.

Mr. DEGRAFFENRIED. And even for armed robbery you have a capital offense.

Mr. ELSTON. Suppose it is an attempted rape on a 9-year-old child and it is not consummated. The attempt can be just as bad almost as the rape itself.

Mr. LARKIN. That is certainly true, except that I think the standard application of punishments in attempts is less than in the consummated crime.

Mr. DEGRAFFENRIED. Well, under your military law, how long does premeditation or deliberation have to exist? In our jurisdiction it only has to exist for an instant.

Mr. LARKIN. I think that is the typical standard.

Mr. DEGRAFFENRIED. And it becomes a jury question as to whether that deliberation or premeditation did exist. On a 9-year-old child he could not claim he was acting in self-defense. And, if it became a question of fact as to whether he was or not, they would in all probability decide that he was acting with premeditation and deliberation, would they not?

Mr. LARKIN. I think the courts have pretty generally held that to be not much more than a fleeting instant. But it has to be some instant.

Mr. BROOKS. Any further discussion?
If there is no further discussion——

Mr. ELSTON. Well, it seems to me, Mr. Chairman, your murder statute is a little mixed up. Is this the way it is in the law now?

Mr. LARKIN. No. (1) and (2) are the law; (3) is not; and (4) is held to be applicable, although (4) is a statutory type of murder, and I do not know the extent to which it has been used.

I do not think it has been used much at all.

Mr. BROOKS. We might do this: If this is the only article that we have in question, we could pass this over until Monday and let everybody study it and think about it.

Mr. DEGRAFFENRIED. I think that is a good idea.

Mr. ELSTON. That may be a good idea. The point I am making is this: I do not know of any State in which you punish a person for murder unless he intentionally kills, and yet you say here he may commit murder without intending to kill. Now, I grant you the intent may be inferred, but in your definition you have an intent to to kill, and you have ignored one type of manslaughter which is certainly prevalent in virtually every jurisdiction in the United States.

You have not defined the two types of manslaughter. I do not know why the death penalty should not be invoked in cases where the person is committing an aggravated felony and intends to kill although there is no premeditation and deliberation. Suppose a man sets fire to a barracks in which there are a lot of soldiers quartered and did not intend to kill anybody in there, did not even know there was anybody in there; the intent is inferred there, of course, but the court would have to tell the jury that the intent would either have to be present by inference or directly.

Suppose he accidentally set fire to it; he would not be guilty of murder.

Mr. BROOKS. Well, suppose we do this: Pass 118 and also 119 over until Monday, and we can think about those two statutes over the week end.

I do not follow everything that has been said here, because in my State we do not have a distinction between the two, nor do we in manslaughter. We have a very simple manslaughter definition. We do not read in two types

of manslaughter. It is either manslaughter or it is not manslaughter.

And our punishment for manslaughter varies from 1 day to 20 years, at the option of the judge.

But, at any rate, if there is no objection we will pass it over until Monday.

That will be one thing we can take up. Now, is there any other article or articles under this section of the code that is subject——

Mr. ELSTON. What about your definition of rape?

Any person subject to this code who commits an act of sexual intercourse with a female not his wife, by force and without her consent, is guilty of rape.

Suppose it is a child, say a child of 15, who does consent but in law lacks the intelligence to give consent. The way your definition is drawn here she could be 6 years old; if she consented there would be no crime of rape.

Mr. LARKIN. I think not. I think that would be a constructive lack of consent.

Mr. ELSTON. I do not think that would be constructive lack of consent. Statutes all fix an age limit. In some States it varies.

Mr. LARKIN. That is right.

Mr. ELSTON. In some it is 16; and in some, 15. In some States they have even gone so far as to make it 18.

Mr. DEGRAFFENRIED. In some States it is a capital offense where the child is under 12 years, and where the child is over 12 and under 16 you have it a felony but provide for a sentence of, say, not less than 2 nor more than 10 years.

Mr. SMART. The age of consent.

Mr. DEGRAFFENRIED. Yes. And they have held this—I have a brief on it which I think I mentioned the other day—you can indict a man for rape.

Of course, they call that other offense sometimes statutory rape, though we call it carnal knowledge.

Carnal knowledge of a child under 12 is a capital offense. Carnal knowledge of a child over 12 but under 16 is a felony with 2 years minimum and 10 years maximum.

But, when you speak of rape ordinarily, you carry with it the idea of force. In the other you do not. They have held that, where a man is indicted for rape and the child is over 12 and under 16 or under 16 and the evidence shows that she consented to it, the element of force being absent, the jury might acquit him.

But you could still turn around and indict him for carnal knowledge of a child under 16, which does not involve the element of force, and try him for that offense, and it would not be a form of jeopardy. I do not know how you define it in military law. You may define rape as rape or constructive rape. And the rape may include all of that. But usually when you speak of rape the thought you have is the idea of force.

Mr. ELSTON. How is it defined now?

Mr. LARKIN. Rape?

Mr. ELSTON. In the military.

Mr. LARKIN. Well, there is no statutory rape in the first place—I mean no age of consent or lack of consent.

Mr. ELSTON. Well, since you are trying to set up a statute, do you not think you ought to include rape with consent?

Mr. LARKIN. Or to enumerate the age of consent?

Mr. ELSTON. Yes.

APPENDIX D

UNITED STATES COURT OF MILITARY APPEALS

No. 31,706

SPCM 11080

UNITED STATES,

Appellee,

v.

TIMOTHY KICK, Specialist Four, U. S. Army,

Appellant,

June 18, 1979.

Appearances: For Appellant—*Captain Barry J. Wendt* (argued); *Colonel Alton H. Harvey, Captain John R. Osgood* (on brief); *Captain Buren R. Shields, III, Captain Willard E. Nyman, III.*

For Appellee—*Captain Gay M. Holmes* (argued); *Lieutenant Colonel Donald W. Hansen, Major John T. Sherwood, Jr., Captain William C. Kirk* (on brief); *Colonel Thomas H. Davis, Major Steven M. Werner.*

OPINION OF THE COURT

FLETCHER, Chief Judge:

The appellant was convicted by a special court-martial of negligent homicide, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. He was sentenced to a bad-conduct discharge, confinement at hard labor for 6 months, and reduction to the lowest enlisted grade. The convening authority approved the findings and the sentence, except that he suspended the execution of

the punitive discharge with provision for automatic remission. The United States Army Court of Military Review has affirmed.

Two issues were granted for review by this Court. The first legal question to be decided is whether homicide through simple negligence is an offense under the Code. The second inquiry is whether the military judge erred to the substantial prejudice of the appellant by failing to give a limiting instruction *sua sponte* in this case to the court members regarding evidence of uncharged misconduct. The former is answered in the affirmative; the latter in the negative. Accordingly, we affirm the decision of the United States Army Court of Military Review.

I

The appellant asserts that simple negligence by a service member which causes the death of another soldier may not lawfully be found to constitute a criminal offense under Article 134, UCMJ. The basis of his assertion is that, in light of case law from certain civilian jurisdictions,[1] a higher degree of negligence must be established by the Government in order to punish a civilian in criminal courts for homicide. Consequently, it is suggested that military law which interprets Article 134, UCMJ, to punish a lower degree of negligent conduct in causing a death is incorrect and without legal effect. We perceive the asserted dichotomy in required standards of conduct in the present case to be an issue of substantive criminal law without constitutional dimensions. *See Parker v. Levy*, 417 U.S. 733, 749-51, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974). We agree such negligent conduct is generally not sufficient to support a criminal conviction for murder or

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[1] The cases cited by the appellant are: *State v. Becker*, 241 N.C. 321, 85 S.E.2d 327 (1955); *State v. Baublits*, 324 Mo. 1199, 27 S.W.2d 16 (1930); *Cannon v. State*, 91 Fla. 214, 107 So. 360 (1926).

manslaughter in military[2] and civilian[3] jurisdictions. Moreover, for the sake of this appeal, we will assume simple negligence in civilian jurisdictions[4] does not form the basis of any other criminal offense. Nevertheless, such conclusions do not necessarily resolve the issue of whether its punishment under Article 134, UCMJ, is unlawful if sufficient notice of its proscription previously existed in military law. *See Parker v. Levy, supra*; *United States v. Staten*, 6 M.J. 275, 276 (C.M.A. 1979).

Article 134, UCMJ, and its statutory predecessor Article of War 96, proscribe all disorders and neglects by a member of the services which prejudice the good order and discipline in the armed forces and all conduct of a nature to bring discredit upon the armed forces. It must be construed in light of authoritative interpretations of military law, existing service customs and common usages. *See Parker v. Levy, supra*, 417 U.S. at 754-54, 94 S.Ct. 2547; *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 15 L.Ed. 838 (1857). This Court in *United States v. Kirchner*, 1 U.S.C.M.A. 477, 4 C.M.R. 69 (1952), specifically found that negligent homicide by a service member could be properly punished under Article 134, UCMJ, as such a disorder. Past court-martial practices with respect to the prosecution of negligent homicide under Article of War 96, and up to that time under Article 134, UCMJ, were noted in detail in that opinion.[5] A more recent decision

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[2] *See* Articles 118 and 119, Uniform Code of Military Justice, 10 U.S.C. §§ 918 and 919, respectively.

[3] *See* 65 C.J.S. Negligance § 1(13); 57 Am. Jur.2d Negligence, § 96; Perkins, *Criminal Law*, pp. 62-4 (1957).

[4] Professor Perkins indicated in 1957 that homicide occasioned by ordinary negligence was criminally punishable by statute in a minority of jurisdictions, but that it was not a crime at common law or by statute in the majority of jurisdictions. *See* Perkins, *supra*.

[5] *See United States v. Kirchner*, 1 U.S.C.M.A. 477, 478, 4 C.M.R. 69, 70 (1952). *See generally* Zoghby, *Is There a Military Common Law of Crimes?* 27 Mil.L.Rev. 75, 90-91 (January 1965).

from the United States Army Court of Military Review clearly articulated the reasons for its prosecution [6] under Article 134, UCMJ:

> There is a special need in the military to make the killing of another as a result of simple negligence a criminal act. This is because of the extensive use, handling and operation in the course of official duties of such dangerous instruments as weapons, explosives, aircraft, vehicles, and the like. The danger to others from careless acts is so great that society demands protection.

United States v. Ballew, CM 434077 (unpublished), p. 2 (A.C.M.R. 16 July 1976).

We agree with both the assessment of the history of court-martial practice regarding this negligent disorder offense and the articulation of its necessity for the military community. Accordingly, consistent with a long line of decisions from this Court,[7] we reject appellant's argument that its prosecution under Article 134, UCMJ, is unlawful in light of the law of civilian jurisdictions.

A second and more subtle challenge to the propriety of this conviction under Article 134, UCMJ, is raised in the

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[6] *See also Manual for Courts-Martial, United States, 1969 (Revised edition)*: Appendix 12, Table of Commonly Included Offenses for Articles 118-19; Appendix 6c, sample specification 154; para. 213f(12); para. 127c, Table of Maximum Punishments, under Article 134; *Manual for Courts-Martial, United States, 1951*: Appendix 12, Table of Commonly Included Lesser Offenses for Articles 118-19; Appendix 6c, sample specification 144; para. 198b; para. 127(c), Table of Maximum Punishments for Article 134.

[7] *United States v. Romero*, 1 M.J. 227 (C.M.A. 1975); *United States v. Bryan*, 19 U.S.C.M.A. 184, 41 C.M.R. 184 (1970); *United States v. Greenfeather*, 13 U.S.C.M.A. 151, 32 C.M.R. 151 (1962); *United States v. Russell*, 3 U.S.C.M.A. 696, 14 C.M.R. 114 (1954); *United States v. Kirchner, supra; United States v. Clark*, 1 U.S.C.M.A. 201, 2 C.M.R. 107 (1952); *United States v. Roman*, 1 U.S.C.M.A. 244, 2 C.M.R. 150 (1952)

appellant's brief. There he contends that since Congress, in enacting the Uniform Code of Military Justice, did not provide for the prosecution of negligent homicide by a service member. Congress intended that only the homicide offenses of murder and manslaughter be prosecuted in military courts under Articles 118 and 119, UCMJ, respectively,[8] and that no other homicide offenses were intended to be criminally punished. As the offense of homicide produced by simple negligence does not embrace a prima facie case under either of these two codal provisions, charging it under Article 134, UCMJ, is a product of unauthorized Presidential and judicial legislation. Consequently, he argues that such a prosecution is without legal effect. *See* U.S.Const. art. I, § 8.

The keystone of such an argument lies in the doctrine of preemption first mentioned by this Court in *United States v. Norris*, 2 U.S.C.M.A. 236, 8 C.M.R. 36 (1953). Simply stated, preemption is the legal concept that where Congress has occupied the field of a given type of misconduct by addressing it in one of the specific punitive articles of the code, another offense may not be created and punished under Article 134, UCMJ, by simply deleting a vital element. *See United States v. Wright*, 5 M.J. 106, 110-11 (C.M.A.1978). However, simply because the offense charged under Article 134, UCMJ, embraces all but one element of an offense under another article does not trigger operation of the preemption doctrine. *United States v. Maze*, 21 U.S.C. M.A. 260, 262-63, 45 C.M.R. 34, 36-7 (1972). In addition, it must be shown that Congress intended the other punitive article to cover a class of offenses in a complete way. *United States v. Maze, supra*; *United States v. Taylor*, 17 U.S.M.C.A. 595, 38 C.M.R. 393 (1968). *See also United States v. Wright, supra.*

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[8] The genesis of such an interpretation of the intent of Congress in enacting these particular provisions of the UCMJ rests on the legal maxim of statutory construction: "Expresio unius est exclusio alterius" *See* Sutherland, *Statutes and Statutory Construction*, § 47.23 (4th ed. Sands 1973).

It is clear in the present case that the appellant was found guilty of negligent homicide under Article 134, UCMJ, and not murder under Article 118, UCMJ, or manslaughter under Article 119, UCMJ. Our review of the legislative history of the latter two codal provisions indicates that their intended purpose was to simply clarify these two particular crimes as a matter of military law.[9] We do not agree that the legislative history of these provisions indicates a clear intent to cover all homicides to the extent of eliminating negligent homicide as an offense under Article 134, UCMJ, the present general disorder prohibition.[10] Negligent homicide prior to the enactment of the UCMJ was treated as a lesser included offense to murder and manslaughter [11] and prosecuted under the 96th Article of War as a general neglect or disorder.[12] It is reasonable to assume that Congress was aware of the existence of such military law when performing its constitutional task to make laws for the armed forces. *See United States v. Taylor*, *supra* at 597, 38 C.M.R. at 395. Accordingly, special reasons existed for not mentioning or treating negligent homicide in conjunction with murder or manslaughter in these provisions of the Code. *See* Sutherland, *Statutes and Statutory Construction*, § 47.23 (4th ed. Sands 1973). Moreover, in

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[9] *See Index and Legislative History, Uniform Code of Military Justice* (Washington, D.C. 1950), Hearings before a Subcommittee of the House Armed Services Committee on H.R. 2498, 81st Congress, 1st Session, pages 1231-32, 1240-50.

[10] In addition, the legislative history of Article 134, UCMJ, indicates that Congress intended this codal provision to allow prosecution of the disorder offenses previously punishable under the 96th Article of War. See Index, *supra* at 1235-38.

[11] *See* footnote 5, *supra*, and para. 180a, Manual for Courts-Martial, United States Army 1949; and Manual for Courts-Martial, U.S. Air Force, 1949.

[12] Paragraph 127c, Table of Maximum Punishments; Appendix 4, sample form 163, Manuals, *supra*.

light of our decision in *United States v. Kirchner, supra,* Congress could have affirmatively acted in the formulation of the 1968 amendments to the Code to eliminate negligent homicide as a criminal offense if it so desired. We are extremely reluctant to conclude that Congress intended these provisions to preempt this offense from the spectrum of punishable criminal homicides in the absence of a clear showing of a contrary intent either in the language of these codal provisions or their legislative history. *See United States v. Taylor, supra* at 597, 38 C.M.R. at 395. Such a result is again consistent with our treatment of this criminal offense throughout the Court's history.[13] Accordingly, we find such an argument as to the granted issue without merit.

II

The second issue granted for review by this Court is whether the military judge erred to the substantial prejudice of the appellant by failing to give a limiting instruction *sua sponte* to the court members regarding evidence of the appellant's previous uncharged misconduct. *See United States v. Grunden,* 2 M.J. 116 (C.M.A.1977); *United States v. Bryant,* 12 U.S.C.M.A. 111, 30 C.M.R. 111 (1961). In our estimation the consumption of beer by a service member off duty, whether on or off base, is not generally a criminal offense nor can it fairly be characterized as uncharged misconduct. Paragraph 138*g*, Manual for Courts-Martial, United States, 1969 (Revised edition). Therefore, as to these incidents described by his unit commander, we see no need for a limiting instruction of this nature. As for the arrest for disorderly conduct and the previous punishment for a five-day unauthorized absence, we do not believe the failure of the military judge to instruct as to the use of evidence of uncharged misconduct rises to the level of prejudicial error, since these incidents demonstrate no general pre-

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[13] *See* footnote 7, *supra.*

disposition to commit the offense of negligent homicide. *See United States v. James*, 5 M.J. 382, 383 (C.M.A. 1978). Finally, the complete testimony of the unit commander clearly indicates that though the appellant purportedly had been drinking prior to his arrest on the disorderly conduct charge, he was only a passenger in the vehicle which originally had been stopped for operation in an unsafe manner. Accordingly, we find any evidentiary inference arising from such a circumstance to be tenuous, and in light of the character evidence instruction given by the military judge, no prejudice could have inured to the appellant.

The decision of the United States Army Court of Military Review is affirmed.

Judge COOK concurs.

PERRY, Judge (dissenting):

The appellant contends before us that homicide through simple negligence [1]—which he points out is the standard

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[1] Paragraph 213f(12), Manual for Courts-Martial, United States, 1969 (Revised edition), in discussing negligent homicide charged under Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934, defines that term as follows:

> [Negligent homicide] is any unlawful homicide which is the result of simple negligence. Simple negligence is a lesser degree of carelessness than culpable negligence. See 198b. It is the absence of due care, that is, an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care for the safety of others which a reasonably prudent man would have exercised under the same or similar circumstances.

"Simple negligence" as thus defined is comparable to "ordinary negligence," *see* 65 C.J.S. Negligence § 1(13), which has been elsewhere "defined as the failure to exercise such care as the great mass of mankind ordinarily exercises under the same or similar circumstances," or the absence of ordinary care. *See* 57 Am.Jur.2d, Negligence, § 98. As the above-quoted Manual paragraph itself points out, it is to be distinguished from "culpable negligence," which paragraph 198b of the Manual, in discussing the degree of negligence required for involuntary manslaughter under Article 119, UCMJ, 10 U.S.C. § 919, defines as

> a degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission. Thus, the basis of a charge of involuntary manslaughter may be a negligent act or omission which, when viewed in the light of human experience, might foreseeably result in the death of another, even though death would not, necessarily, be a natural and probable consequence of the act or omission.
>
> Acts which may amount to culpable negligence are negligently conducting target practice so that the bullets go in the direction of an inhabited house within range; pointing a pistol in fun at another and pulling the trigger, believing, but without taking reasonable precautions to ascertain, that it would not be dangerous; and carelessly leaving poisons or dangerous drugs where they may endanger life.

While definitions of culpable negligence vary among jurisdictions, it has been denominated as gross negligence and it constitutes such

of negligence under which he was convicted [2]—is not an offense under the Uniform Code of Military Justice.[3] I agree and, therefore, must dissent from the majority opinion.

The area of homicide is addressed with considerable specificity in Articles 118, Murder, and 119, Manslaughter, of the Code.[4] However, homicide through a degree of

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a departure from conduct of ordinarily careful and prudent men as to reflect indifference to the consequences. It is more than ordinary negligence, more than lack of ordinary care. *See* 65 C.J.S. *supra*, § 1(13). *See also* 57 Am.Jur.2d, *supra*, § 99.

[2] The military judge instructed the court members that to convict the appellant of the charged offense of negligent homicide, they must find that his actions constituted simple negligence, and he defined "simple negligence" for them in terms of paragraph 213*f*(12), Manual, *supra*. *See* n. 1, *supra*.

[3] Additionally, we granted review of the appellant's allegation that the military judge at his court-martial committed prejudicial error by failing to instruct the court members, *sua sponte*, concerning the limited purpose for which evidence of other, uncharged misconduct was admitted. Because of my position on the first issue, however, I need not resolve this claim.

[4] § 918, Art. 118. Murder.

Any person subject to the chapter who, without justification or excuse, unlawfully kills a human being, when he—

(1) has a premeditated design to kill;

(2) intends to kill or inflict great bodily harm;

(3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or

(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;

is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct.

§ 919, Art. 119. Manslaughter.

(a) Any person subject to this chapter, who, with an intent to kill or inflict great bodily harm, unlawfully kills a human

negligence less than culpable is not included therein. Instead, the military services have prosecuted homicide through simple negligence by the vehicle of Article 134.[5] Whether this use of the general article, as Article 134 justifiably has come to be known, is a proper one was first frontally addressed by the Court in *United States v. Kirchner*, 1 U.S.M.C.A. 477, 478, 4 C.M.R. 69, 70 (1952), where the Court held:

> Considering the problem solely from the standpoint of the language of these two phrases ["prejudice of good order and discipline" and "discredit upon the armed forces"] taken from Article 134, supra, we entertain no doubt of the fundamental propriety of punishing thereunder a killing resulting from simple negligence in the handling of firearms.

The Court found that this view was buttressed by the recognition of it in the Manual for Courts-Martial, United

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being in the heat of sudden passion caused by adequate provocation is guilty of voluntary manslaughter and shall be punished as a court-martial may direct.

(b) Any person subject to this chapter who, without an intent to kill or inflict great bodily harm, unlawfully kills a human being—

(1) by culpable negligence; or

(2) while perpetrating or attempting to perpetrate an offense, other than those named in clause (4) of section 918 of this title (article 118), directly affecting the person;

is guilty of involuntary manslaughter and shall be punished as a court-martial may direct.

[5] § 934, Art. 134. General article.

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

States, 1951, as a less serious offense than involuntary manslaughter; by the recognition of it as an offense in previous opinions of the Court (citing *United States v. Roman*, 1 U.S.C.M.A. 191, 2 C.M.R. 150 (1952), and *United States v. Clark*, 1 U.S.C.M.A. 201, 2 C.M.R. 107 (1952), both of which involved homicide through simple negligence but neither of which addressed the question whether it properly was an offense cognizable under the general article); and by prior holdings of Army and Air Force boards of review recognizing that negligent homicide, requiring a degree of negligence less than gross or culpable, is an offense under the general article.

Significantly, however, the Court in *Kirchner* made no reference, nor gave any consideration, to the doctrine of preemption—the concept that the Congress has preempted the field of a given type or misconduct by addressing it in one of the specific punitive articles of the Code and that another offense cannot be created and punished under the general article simply by deleting a vital element. First mention of this theory by the Court was in *United States v. Norris*, 2 U.S.C.M.A. 236 2 C.M.R. 36 (1953). Initially, the *Norris* Court observed: [6]

> In discussing the Code during Senate Subcommittee hearings, Professor Morgan commented that "we have made specific several offenses which were previously punishable under the general article." He added that it was the intent of the drafters to specifically define the nonmilitary offenses and leave the general article "pretty much only for military offenses." [7] Hearings before Senate Committee on

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[6] *United States v. Norris*, 2 U.S.C.M.A. 236, 239, 8 C.M.R. 36, 39 (1953).

[7] To the extent that the "disorder offenses" addressed in footnote 10 of the majority opinion extend to nonmilitary-type disorders of routine civilian nature, such as homicide through simple negligence, Professor Morgan's comment refutes the "legislative history" referenced in that footnote.

Armed Services on S. 857 and H.R. 4080, 81st Congress, 1st Session (1949), pages 37, 47.

Thereupon, the Court concluded: [8]

> It is our view that, in accordance with the remarks of Professor Morgan, quoted earlier, Article 134 should generally be limited to military offenses and those crimes not specifically delineated by the punitive Articles. See Winthrop's Military Law and Precedents, 2d ed., 1920 Reprint, page 720. As the Manual itself notes, there is scarcely an irregular or improper act conceivable which may not be regarded as in some indirect or remote sense prejudicing military discipline under Article 134. Manual for Courts-Martial, United States, 1951 page 381. We cannot grant to the services unlimited authority to eliminate vital elements from common law crimes and offenses expressly defined by Congress and permit the remaining elements to be punished as an offense under Article 134.

This doctrine was spoken to most recently by this Court in *United States v. Wright*, 5 M.J. 106, 110-11 (C.M.A. 1978), where we stated:

> *Norris* stressed, as have later opinions on the subject, that the applicability of the preemption doctrine requires an affirmative answer to two questions. The primary question is whether Congress intended to limit prosecution for wrongful conduct within a particular area or field to offenses defined in specific articles of the Code; the secondary question is whether the offense charged is composed of a residuum of elements of a specific offense and asserted to be a violation of either Articles 133 or 134, which, because of their sweep, are commonly described as the general articles.

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[8] *United States v. Norris, supra* at 239, 8 C.M.R. at 39.

I believe that the Congress manifested its intent to preempt the field of homicide in the military by its enactment of the detailed specific Articles 118 and 119.[9] After reiterating its conclusion in *Norris* concerning the limitation on the coverage of Article 134, the Court in *United States v. McCormick*, 12 U.S.C.M.A. 26, 28, 30 C.M.R. 26, 28 (1960), opined:

> The such is a sound construction of Article 134 is beyond doubt. The statute expressly excepts from its coverage conduct "not specifically mentioned in this chapter" and each of the general articles which preceded it, ranging backward through history to those extant in the British Army, were similarly intended only "to provide a general remedy for wrongs not elsewhere provided for." Winthrop, supra, page 725.

By enacting Articles 118 and 119 of the 1951 and 1968 Codes, the Congress specifically proscribed *every* degree of homicide except one: homicide through simple negligence. Had it intended to punish such conduct, it would have been a simple matter to have included it in this otherwise completely comprehensive statutory scheme. Instead, I infer that its omission under these circumstances was intentional. *Expressio unius est exclusio alterius.* Where the Congress has not proscribed certain conduct, either specifically or through its intent behind the general article, it is not for the President to do so through the Manual for Courts-Martial, nor for this Court to do so through acquiescence to prosecutorial initiative. What Judge Ferguson said in *McCormick* bears repeating: [10]

> Nor is there any basis for the proposition that the President may create an offense under the Code. To the contrary, our forefathers reposed in the Congress alone the power "To make Rules for the Government and Regulation of the land and naval Forces."

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[9] *See* note 4, *supra.*

[10] *United States v. McCormick*, 12 U.S.C.M.A. 26, 28, 30 C.M.R. 26, 28 (1960).

United States Constitution, Article 1, Section 8. The President's power as Commander-in-Chief does not embody legislative authority to provide crimes and offenses. See Crosskey, Politics and the Constitution, 423-425 (1953); concurring opinion of Mr. Justice Harlan, *Reid v. Covert*, 354 U.S. 1, 68, 1 L ed 2d 1148, 77 S.Ct. 1222 (1957). And in this area under the Code, the Executive's authority has expressly been limited to the authority to prescribe rules of evidence and procedure and maximum limits upon the punishments which a court-martial may direct. Code, supra, Articles 36, 56, 10 USC §§ 836, 856. See also *United States v. Symonds*, 120 U.S. 46, 30 L ed 557, 7 SCt 411 (1887), and *Hirshberg v. Cooke*, 336 U.S. 210, 69 S.Ct. 530, 93 L ed 621 (1949).

For the foregoing reasons, I conclude that homicide through simple negligence may not be made an offense under the general article of the Code simply by deleting the culpable aspect of the negligence of concern in Article 119(b)(1).[11] I would reverse the conviction.

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[11] I am aware of the argument that

> [t]here is a special need in the military to make the killing of another as a result of simple negligence a criminal act. This is because of the extensive use, handling and operation in the course of official duties of such dangerous instruments as weapons, explosives, aircraft, vehicles and the like. The danger to others from careless acts is so great that society demands protection.

United States v. Ballew, CM 434077 (unpublished), p. 2 (A.C.M.R. 1976). Yet, this does not point out any special need for proscribing homicide through *simple* negligence, for misuse of such dangerous instruments in the military setting likely would rise to the level of *culpable* negligence (see examples of "culpable negligence" discussed in paragraph 198b, Manual, *supra*), if, indeed, there was any negligence at all in a given case. In any event, I do not say here that the Congress *could* not include homicide through simple negligence in the Code (*but see* 57 Am.Jur.2d, Negligence, § 96; 65 C.J.S. Negligence § 1(13); Perkins, *Criminal Law*, 65 and 68 (1957) (concerning the level of negligence appropriate to attach criminal liability); I only say that it did not, and to whatever extent the military services perceive a need for it in the military justice system, their recourse is entirely legislative.

APPENDIX E

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGH
CM 240043

UNITED STATES

v.

PRIVATE HENRY E. VISLAN
(36043355), Company C, 33rd Infantry

TRINIDAD SECTOR AND BASE COMMAND
Trial by G.C.M., convened at Camp Paramaribo, Surinam, 11 June 1943. Dishonorable discharge (suspended) and confinement for two (2) years. Rehabilitation Center.

OPINION of the BOARD OF REVIEW
DRIVER, LOTTERHOS and LATTIN, Judge Advocates

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1. The record of trial in the case of the soldier named above has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence. The record has now been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Henry E. Vislan, Company C, 33rd Infantry, United States Army Forces in Surinam, did, at Paranam, Surinam, on or about April 26, 1943, willfully, feloniously, and unlawfully kill Leonard Sutton, by shooting him in the head with a rifle.

He pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years. The reviewing authority approved the sentence, ordered it executed, but suspended the dishonorable discharge, and designated the Rehabilitation Center, Eighth Service Command, Camp Bowie, Texas, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 170, Headquarters Trinidad Sector and Base Command, 1 August 1943.

3. The evidence for the prosecution shows that at about 7:45 a.m. on 26 April 1943 accused and several other soldiers gathered near the "guard shack" at Camp Paranam, Surinam, preparatory to reporting for infantry drill at eight o'clock. While they waited, Private Leonard Sutton was at one side doing bayonet practice by himself. About five minutes before eight o'clock, four of the soldiers started up the road to assemble for drill. They proceeded in the following orders: Privates First Class Seeley S. Talmadge and William A. Hilliard, accused, and then Sutton. There was a distance of about 50 yards between Hilliard and accused. Sutton had the habit of walking with his head down. According to native witnesses accused was carrying his rifle at port arms and swinging it back and forth, and as he turned around with the muzzle pointing upward, the rifle "just went off". Sutton fell to the ground, accused threw his rifle down and Corporal Hugh L. Wilcox, as well as Talmadge and Hilliard, ran

to Sutton. Accused did not move, stated that it was an accident, that "he didn't know the gun went off," and kept repeating "You know I didn't mean to do it". Several officers, including First Lieutenant Edward J. Bruger, Officer of the Day, went immediately to the scene. Lieutenant Bruger picked up the rifle of accused, removed seven rounds, and asked accused whether his rifle had gone off. Accused stated that as he was walking the butt of his rifle was swinging in front of him and hit the ground and that he "didn't even know the rifle went off until he turned around and saw that some one had been hit." He also stated that it was "absolutely accidental, and he "wouldn't shoot a friend". Captain Irving E. Marks, Medical Corps, examined Sutton immediately after the shot was fired, and found him dead from a bullet wound in the head. The point of entrance was in the center of the forehead between the eye orbits, and the point of exit was in the center of the back of the head at approximately the same level. (R. 4-8, 13-23, 25-26).

Accused and Sutton were "pretty good friends", they had had a dispute about a dog at some undesignated date, accused was frequently "clowning" and playing, and immediately after the incident the reactions of accused were "natural of any one involved in an accident of that nature" (R. 6, 12, 23-24).

4. The accused testified that on 25 April he was on guard duty from noon to 6:00 p.m., that when he was relieved he unloaded his rifle and put the cartridges in the front pocket of his belt, and that he left the rifle and belt in the "guard shack" because it was raining. The next morning he did not inspect his rifle and "knew it was unloaded because I took them out the day before. I guessed no one would put any cartridges in my gun". On that morning, 26 April, accused took his gun and belt from the "guard shack", stood around a few minutes, and started walking toward the "CP" for infantry drill. He had his gun on his shoulder, then took it off, intending

to wait for some of the other soldiers, and was swinging it "a little" with his hand at the top of the stock, as he walked. The rifle was about ten inches from the ground with the butt down, when it slipped from his hand, and the butt hit the ground. Accused heard a shot, did not realize that it was from his gun, and did not know exactly how it happened. At this time he was facing toward the "CP", and immediately turned around. He had left Sutton at the "guard shack with his bayonet" and did not notice anyone behind him. Accused had been in the Army about two years, and had never pointed a rifle at a soldier or friend. He considered Sutton as a friend (R. 27-36).

5. The evidence shows that as accused walked toward the appointed place for infantry drill, just before 8:00 a.m. on 26 April 1943, he removed his rifle from his shoulder, was swinging it from side to side in a position of port arms, and as he turned around the rifle "went off" in some unexplained manner. According to accused he did not turn around, the rifle slipped from his hand as he was swinging it, and it was fired as the butt struck the ground. It is not shown that accused knew that the rifle was loaded, and he testified that he had unloaded it at six o'clock the previous evening when he was relieved from guard duty, and therefore "knew" it was not loaded. The bullet from the rifle struck and killed Private Leonard Sutton, who was walking behind accused at the time.

It is obvious that the finding of guilty was of involuntary manslaughter, based on the theory that the death of Sutton resulted from gross or criminal negligence of accused (culpable negligence as stated in the Manual for Courts-Martial), although the court did not delete the words "willfully, feloniously, and" from the Specification. Involuntary manslaughter includes homicide unintentionally caused by culpable negligence in performing a lawful act. Instances of culpable negligence in performing a

lawful act are: Negligently conducting target practice so that the bullets go in the direction of an inhabited house within range, and pointing a pistol in fun at another and pulling the trigger, believing, but without taking reasonable precautions to ascertain, that it would not be discharged (MCM, 1928, par. 149*a*). But there is a substantial difference between the instances cited, and what the evidence shows that accused did. One who fires a rifle must exercise extreme diligence to know that nobody is within the line of fire, and one who voluntarily points a rifle at someone else is under the special duty to know that it is not loaded. Accused did not intentionally fire his rifle and did not point it; the most that can be said is that he handled it carelessly. Had it been shown that he knew the gun was loaded it is possible that careless handling in the manner proved might have amounted to criminal negligence, but not so when accused was without such knowledge. Simple negligence is not sufficient to convert a homicide into involuntary manslaughter; there must be criminal or gross (culpable) negligence.

> "* * * where an unintentional homicide is occasioned by the gross or culpable negligence of defendant, although in the commission of an act lawful in itself, it is manslaughter * * *. While the kind of negligence required to impose criminal liability has been described in different terms, it is uniformly held that it must be of a higher degree than is required to establish negligence upon a mere civil issue, and it must be shown that a homicide was not improbable under the facts as they existed which should reasonably have influenced the conduct of accused. The negligence must not be so gross as to raise the presumption of malice, it must have been the negligence of defendant personally, and it must be the proximate cause of the homicide. * * * (29 C.J. 1154-1155).
>
> "Homicide by misadventure is the accidental killing of another, where the slayer is doing a lawful

act unaccompanied by any criminally careless or reckless conduct. A homicide committed by accident, misadventure, or misfortune is excusable; and, as in other cases of excusable homicide, the slayer is not criminally responsible therefor. * * * Thus it is excusable homicide if death unfortunately ensues * * *, under some circumstances, where a pistol or other firearm is accidentally and unintentionally, or even intentionally, discharged." (30 C.J. 87).

In the opinion of the Board of Review the evidence does not show criminal, gross or culpable negligence, but simple negligence only, and therefore the homicide was within the classification of accidental.

6. The Board of Review is, therefore, of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Samuel M. Driver, Judge Advocate

F. J. Lotterhos, Judge Advocate

Norman D. Lattin, Judge Advocate

1st Ind.

War Department, J.A.G.C., Nov. 5, 1963—to the Secretary of War.

1. Herewith transmitted for action under Article of War 50½ as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) is the record of trial in the case of Private Henry E. Vislan (36043355), Company C, 33rd Infantry.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings and sentence be vacated and that all rights, privileges and property of which accused has been deprived by virtue of said sentence be restored.

3. Inclosed is a form of action carrying into effect the recommendation made above.

/s/ T. H. Green
T. H. GREEN
Brigadier General,
U.S. Army, Acting The
Judge Advocate General.

Incls.
Incl.1-Record of Trial.
Incl.2-Form of Action.

(Findings and sentence vacated, by order of the Under Secretary of War. G.C.M.O. 368, 15 Nov 1943)

APPENDIX F

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGH
CM 252521

UNITED STATES

v.

SECOND LIEUTENANT FRANCIS G. GROAT
(0-763572), Air Corps.

THIRD AIR FORCE

Trial by G.C.M., convened at Dale Marby Field, Florida, 25 February 1944. Dismissal.

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS,
Judge Advocates

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1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 93rd Article of War.

Specification: In that 2nd Lt. Francis G. Groat, AC, Dale Mabry Replacement Depot Detachment, Dale Mabry Field, Tallahassee, Florida, did at Dale Mabry Field, Florida on or about 8 Feb 1944 negligently and unlawfully kill S/Sgt Harry N. Bielawski, 306th Fighter Squadron, 338th Fighter Group, Dale Mabry Field, Florida, by striking him with the right front fender of an automobile which he the said 2nd Lt Francis G. Groat was then operating in a grossly negligent manner.

CHARGE II: Violation of the 96th Article of War.

Specification 1: In that 2nd Lt Francis G. Groat, AC, Dale Mabry Replacement Depot Detachment, Dale Mabry Field, Tallahassee, Florida, did, at Dale Mabry Field, Florida, on or about 8 Feb 1944 operate a motor vehicle while under the influence of liquor, this to the prejudice of good order and military discipline.

Specification 2: In that 2nd Lt Francis G. Groat, AC, Dale Mabry Replacement Depot Detachment, Dale Mabry Field, Tallahassee, Florida, did, at Dale Mabry Field, Florida, on or about 8 Feb 1944 while operating a motor vehicle leave the scene of an accident without making himself known and without rendering necessary aid and assistance, after striking and fatally injuring S/Sgt Harry N. Bielawski, 306th Fighter Squadron, 338th Fighter Group, Dale Mabry Field, Florida, this to the prejudice of good order and military discipline.

He pleaded guilty to Specification 2, Charge II, and to Charge II; and not guilty to the remaining Specifications and Charge. He was found guilty of the Specification, Charge I, except the words "and unlawfully" and "in a grossly negligent manner"; not guilty of Charge I but guilty of a violation of the 96th Article of War; and

guilty of Specifications 1 and 2, Charge II and of Charge II. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. Evidence for the prosecution: Second Lieutenant William R. Brock testified that he and accused were members of the organization and stationed at Dale Mabry Field, Tallahassee, Florida. They left the base on the afternoon of 8 February 1944 at approximately 1600 and drove to Tallahassee in the car of accused. Here they visited a place called the "High Hat" where they consumed a "couple of beers and a sandwich". They also opened a "bottle of whiskey" and each had "three or four" drinks mixed with "coke and lemon juice". They drove back to the base, Lieutenant Brock at the wheel, about 1730, to pick up Lieutenant Brock's raincoat, remained there "20 or 30" minutes and then returned to the "High Hat", "not long after six". They continued drinking until there was "slightly less than half" of the bottle of whiskey left. Each drank about the same amount. About 2000 they returned to the base, accused driving the car. They stopped at the "east gate", were recognized by the guards, and continued "on the road coming into the base". The road was "perfectly straight", about 40 feet wide, with room for two traffic lanes in each direction, and a white line in the middle. It was about 2015 or 2030, dark, the headlights were on and there were some others cars on the road. Lieutenant Brock was "turned in the seat leaning on the door" talking to accused. Accused was watching the road and driving "25 or 30, it wasn't very fast". He (Brock) heard a "thud", saw the "fleeting image" of a man in front of the right fender and told accused they had hit someone. Accused was "dubious of that fact" but Lieutenant Brock "convinced" him. Accused became "highly frightened and excited". Lieutenant Brock told him they would have to stop and pick the man up. Accused drove on

"perhaps another block", turned the car around, passed the scene of the accident, said they were going to leave the base and came back to the gate. When he stopped at the gate Lieutenant Brock got out and reported "it to the MP" and then went to the provost marshal. Accused drove off on the "road that leads into town". Lieutenant Brock further testified that the accident occurred "where the extension of the runway meets the road". There were street lights at the place. Accused had been driving in a "normal" manner and did not change his speed after the accident occurred (R. 7-17).

Photographs (Exs. 2 and 3) of the car driven by accused, taken shortly after the accident, were received in evidence. They disclose a broken lens on the right headlight and a pronounced indentation in the right fender above the headlight (R. 17).

Corporal Steve A. Gornich, 306th Fighter Squadron, testified that he and Staff Sergeant Harry Bielawski worked in the engineering section at the base and finished work at 2000 on 8 February 1944. They had a soda and proceeded up the road toward their barracks. They wore light colored fatigue clothes; those Sergeant Bielawski wore had faded nearly white from washing. They walked on the right hand side of the paved portion of the road, Cornich about six or seven inches from the edge of the pavement and Bielawski close at his left side. There were other pedestrians on the road. Ordinarily there was considerable pedestrian traffic along the side of the road. It was "pretty dark", but it was clear and the road was dry. Gornich noticed the approach of a car to their back by the flash of the headlights, suddenly there was a noise, something brushed along Gornich's thigh, he saw sparks flying, apparently from Bielawski's cigarette, and Gornich realized Bielawski had been hit. His body was thrown about 25 or 30 feet ahead and lay in the gutter next to the pavement. Gornich saw the tail light of the car as it continued up the

road without stopping or slowing up. In his opinion it was traveling about 35 or 40 miles an hour. Gornich further testified that they usually marched to work and had been instructed to face the traffic. This night they were walking with the traffic. Bielawski made no sound when he was hit and Gornich did not yell out. He did not know whether Bielawski was thrown or carried forward by the car (R. 22-29).

Bielawski was taken to the station hospital where, according to the death certificate (Ex. 1), he died on 9 February 1944 at 8:40 a.m. An autopsy performed on that date disclosed extensive trauma of the brain and hemorrhage over the surface of the brain, considerable trauma of the chest wall, hemorrhage at the base of the left lung and in some of the lobes of the intestinal tract and fracture of the left knee. These injuries, a medical officer testified, were consistent with his being struck by an automobile, and were the cause of death (R. 6-7, 20-21, 26).

Between "quarter to nine and nine o'clock", "20 minutes to a half hour" after Lieutenant Brock reported the accident at the east gate of the field, accused came up to the sentry and said "he had been drinking and had hit a soldier on the base, and he got excited and went off the base and he came back to report it". Accused was very nervous and "wasn't walking straight". The sentry testified, however, "I can't say he was drunk". Accused was taken to Major John E. Gross, provost marshal of the base, "about 9:00 o'clock". There was the odor of liquor about accused, he appeared to have been drinking, his nose was red, eyes watery and his step "rather" unsteady. Major Gross thought accused was under the influence of liquor. Accused was taken to the hospital for a sobriety test. On the way to the hospital, after being warned that whatever he said might be used against him, he told Major Gross that he was very much upset, he had been driving a car with Lieutenant Brock and

struck a man, he became very frightened and started to leave the base, Lieutenant Brock demanded that he be let out of the car saying "he didn't want to have anything to do with this business", and when the car reached the gate Lieutenant Brock got out while he (accused) went on. Accused also told Major Gross that he had drunk "three or four" bottles of beer and that he and Lieutenant Brock had split a bottle of whiskey between them. Major Gross did not recall whether accused said a "pint or a fifth". The car of accused was examined the next day and Major Gross thought two unopened "fifths" of whiskey were found in it, but no open bottles (R. 29-33, 34-35).

Accused was given an "army intoxication test" at the hospital at about "9:00 o'clock" by First Lieutenant David Frost, Medical Corps. Accused was observed to have the "sr ll" of alcohol on his breath; he was "quite confused" a d "rather hesitating" in repeating "Methodist Episcopal" after the medical officer; he had a "slight amount" of difficulty in walking a straight line; he wavered and had "slight difficulty" maintaining his balance when he stood with heels and toes together, hands behind his back or at his side, with his eyes closed; he had no hand tremors when his arms were stretched out; he "practically fell over" when he placed his right heel in front of his left toe; he stated he had consumed about three bottles of beer and "an unspecified amount" of whiskey; and a blood test given at "9:40" revealed "one mgm percent" of alcohol. Based upon these tests (other than alcoholic content of blood) Lieutenant Frost was of the opinion that accused was under the influence of intoxicating liquor and could not perform his normal military functions. He admitted that a highly excited, extremely frightened man would have difficulty in performing the tests. A report (Ex. 4) summarizing the results of the tests was made out upon their completion and signed by Lieutenant Frost, Major Gross and ac-

cused. Lieutenant Frost believed that a man could sign his name and still could not perform his military functions. He did not think "the man was very drunk" (R. 17-22).

Accused, after being informed of his rights, made a sworn, written statement (Ex. 5) to the investigating officer, in which he recounted the events on the night in question substantially as related by Lieutenant Brock in his testimony. Accused stated that they opened a "fifth" and each consumed about a half pint of whiskey during the afternoon and evening. After returning to the base accused was driving about 25 miles per hour when he heard a "thud" but he did not see anything. Lieutenant Brock said accused had hit somebody. Accused became very frightened, and drove out to the gate where Lieutenant Brock got out while accused drove on. After "10 or 15 minutes" accused realized "what a big mistake" he had made so he returned to the base and reported the accident (R. 33-34).

4. Evidence for the defense: Captain Francis W. Paul, Medical Officer with the 305th Fighter Squadron, identified "Laboratory Methods of the United States Army" (Ex. 6) as a manual of laboratory procedure in use at the station hospital at Dale Mabry Field. The manual states that the amount of alcohol in the urine approximates the amount of alcohol in the blood, and that according to medical research a concentration of one milligram per cubic centimeter of urine indicates a "decent and decorous" condition, two milligrams "distinctly drunk", three milligrams "drunk and disorderly", and four milligrams "dead drunk". Captain Paul was of the opinion that the "shock and realization of what happened" would account for the reactions displayed by accused to the sobriety test recorded on Exhibit 4. On cross-examination Captain Paul stated that the odor of alcohol on the breath of accused and the presence of alcohol in his blood could not be accounted for by shock.

He further stated that the figures given in the laboratory manual were "average figures" and that some individuals unaccustomed to drinking would be "dead drunk" with "1% alcohol content in the blood" while others could have more than "4%" and still not be "dead drunk". A person with "1%" alcoholic content is under the influence of alcohol, but normally would remain decorous (R. 35-38).

Lieutenant Brock, recalled as a defense witness, testified that he and accused had each consumed about a half pint of whiskey between 4:30 and 8:00 p.m. on 8 February. Accused gave no indication of being drunk at the time of the accident. Immediately after the accident accused appeared "to not have control of himself" (R. 38-40).

Accused testified that this was "one of the saddest incidents" in his life. He had tried to supply the truth on everything that he could and had made a sworn statement to the investigating officer which was the "exact truth that it is possible for me to tell". The collision with Sergeant Bielawski along with the statement of Lieutenant Brock threw him into a panic, he could not think or do anything that an "intelligent man" should have done at the time, and it was 10 or 15 minutes before he realized what he should have done. As to his condition at the hospital during the examination, he was not drunk, only nervous and upset. He did not drive under the influence of alcohol. He operated the car in a careful manner, was not negligent, did not exceed the speed limit, did not drive on the wrong side of the road and was in the "usual spot" a car should be in at all times (R. 41, 43-44).

On cross-examination and examination by the court accused testified that his car was in excellent working condition, his headlights were the new sealed beam lights no portion of which was blacked out, and at the time of the accident they were on low beam. There were cars

coming from the opposite direction with their headlights on. He was watching the road and driving "at least three or four feet" from the right hand side of the road. He did not see "these two boys" in the street or any other pedestrians. All he heard was "the noise". The impact put out his right light but he did not notice it at the time. After he turned around he made no effort to stop or look for the body. He stopped at the gate to be recognized and not for the express purpose of allowing Lieutenant Brock to alight. After he left the field he drove to Tallahassee, made a circle around the town and came right back (R. 41-44).

5. *a.* Accused and Lieutenant William R. Brock left Dale Mabry Field at 1600 on 8 February 1944 in a car belonging to accused and drove into Tallahassee where they visited a place called the "High Hat". Between that time and 1730 when they returned to the base to pick up Lieutenant Brock's raincoat each had a couple of bottles of beer and three or four drinks of whiskey mixed with "coke" and lemon juice. They came back to the "High Hat", drank some more whiskey and finally returned to the base about 2000. According to accused and Lieutenant Brock each consumed about a half pint of whiskey during the afternoon and evening. Accused drove the car back to the base, stopped at the gate to be recognized and then continued on the road into the base. The road was straight, paved, about 40 feet wide, with room for two traffic lanes in each direction and a white line in the middle. It was dark, the night was clear and the road dry. About 2015 or 2030 Staff Sergeant Harry Bielawski and Corporal Steve A. Gornick were walking along the road on the way to their barracks from the engineering section where they had been working. They walked on the right hand side of the road, Gornich about six or seven inches from the edge of the pavement with Bielawski close to his left side. They wore light colored fatigue clothes. According to Gornich there were other

pedestrians on the road. The car driven by accused overtook the two soldiers, the right hand fender struck Bielawski and carried or threw him a distance of 25 or 30 feet ahead. There were street lights at this place in the road. The car did not change speed but continued down the road at a speed estimated by Gornich at 35 or 40 miles per hour. Bielawski was taken to the station hospital where he died the following morning from the injuries received.

Lieutenant Brock testified that accused was watching the road at the time of the accident and driving around 25 or 30 miles per hour. Accused testified to the same effect and stated that he did not see the two soldiers or any other pedestrians on the road. The first they were aware of was a "thud" and Lieutenant Brock saw the "fleeting image" of a man in front of the fender. Accused became frightened and excited, drove on a short distance and then returned past the scene of the accident. Lieutenant Brock said they would have to pick the man up but accused did not stop and said they were going to leave the base. When accused stopped at the gate Lieutenant Brock got out of the car and reported the accident to the sentry. Accused, however, drove off the base and into Tallahassee. He returned to the base about "20 minutes to a half hour" after Lieutenant Brock had reported the accident, approached the sentry and said he had been drinking and had hit a man at the base. The sentry noted that accused was not walking straight but testified "I can't say he was drunk". Accused was turned over to Major John E. Gross, the provost marshal, who observed an odor of liquor about accused, nose red, eyes watery and step "rather" unsteady. Accused told Major Gross that he and Lieutenant Brock had split a bottle of whiskey between them. Major Gross could not recall whether accused said a pint or a "fifth". In a statement to the investigating officer accused said they had opened a "fifth" of whiskey.

Accused was given an intoxication test at the hospital about 2100. He was found to have one milligram per cubic centimeter of alcohol in his blood (blood test taken at 2140); there was the odor of alcohol on his breath; he had difficulty in repeating the words "Methodist Episcopal"; he had difficulty in walking a straight line and in balancing himself when he stood with heels and toes together, hands behind his back and eyes closed; and he "practically" fell over when he placed his right heel in front of his left toe. On the basis of these tests the medical officer gave his opinion that accused was under the influence of intoxicating liquor and could not perform normal military functions, although he was not "very drunk".

b. The evidence is sufficient to show beyond any reasonable doubt that accused operated his automobile while under the influence of liquor as alleged (Spec. 1, Chg. II). The evidence also clearly shows, and his plea of guilty admits, that accused left the scene of the accident without making himself known and without rendering necessary aid or assistance (Spec. 2, Chg. II). Such acts were in violation of the 96th Article of War.

c. The remaining Specification (Spec., Chg. I) alleged that accused did "negligently *and unlawfully* kill S/Sgt Harry N. Bielawski * * * by striking him with * * * an automobile which he * * was then operating *in a grossly negligent manner*," in violation of Article of War 93. The court found him guilty of the Specification except the words underscored, "and unlawfully" and "in a grossly negligent manner", in violation of Article of War 96.

The Specification as drawn alleges the offense of involuntary manslaughter defined by the Manual for Courts-Martial (par. 149*a*), as an unlawful "homicide unintentionally caused in the commission of an unlawful act not amounting to a felony, nor likely to endanger life, or by culpable negligence in performing a lawful act, or in per-

forming an act required by law". By its findings that the homicide was not unlawful and his operation of the car not grossly negligent, the court acquitted the accused of manslaughter and found him guilty of negligently killing "S/Sgt Harry N. Bielawski" by striking him with an automobile which accused was then operating. There is ample evidence to show that the homicide was the result of negligence on the part of accused. Accused operated his car while under the influence of liquor and at a speed in excess of that reasonable and proper under conditions then existing. His testimony that he did not see the deceased walking along the road shows that he failed to maintain a proper lookout for pedestrian traffic on the road, in the absence of any factors which might have interfered with his vision. His negligent killing of another soldier on a military post was a neglect to the prejudice of good order and military discipline and a violation of Article of War 96.

6. The accused is 24 years of age. The records of the Office of The Adjutant General show his service as follows: Aviation cadet from 15 March 1943; appointed temporary second lieutenant, Army of the United States, and active duty, 7 January 1944.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 96th Article of War.

Samuel M. Driver, Judge Advocate.

O'Connor, Judge Advocate.

(Dissent), Judge Advocate.

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGH
CM 252521

UNITED STATES
v.

SECOND LIEUTENANT FRANCIS G. GROAT
(0-763572), Air Corps.

DISSENTING OPINION
LOTTERHOS, Judge Advocate

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1. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the finding of guilty of Specifications 1 and 2, Charge II, and of Charge II, to support the sentence and to warrant confirmation of the sentence. I also concur in the statement that the court by its findings acquitted accused of manslaughter and found him guilty of negligent homicide. Although I agree that the evidence shows that accused negligently killed Bielawski by striking him with the fender of an automobile which accused was driving, I do not concur in the view that the Specification, Charge I, without the words excepted by the court in its findings, charges an offense.

2. That a specification must exclude every reasonable hypothesis of innocence—must be so drawn that if all the facts expressly or impliedly pleaded therein be admitted

as true or duly proven to be true, the accused cannot be innocent—may be regarded as the settled law "of this office" as it is the settled law of the land (CM 187548, *Burke*, citing CM 132905, *Osborn*, and CM 110347, *Denham*).

3. Where an act charged is not *per se* an offense, words must be used in the specification to make it an offense, as "assault", "unlawful" or "wrongful" (See Dig. Op. JAG, 1912-40, sec. 451 (8) (CM 113535 and CM 130811); 1 Bull. JAG 18 (CM 218409, *Chadderdon*); 2 Bull. JAG 17 (CM 226512, *Lubow*)). In the Lubow case it was held that an allegation that accused "did * * * drive a motor vehicle while drunk", in violation of the 96th Article of War, did not state an offense, because it was not alleged that the driving was "wrongful or unlawful" nor that the vehicle was driven on a public road or highway.

4. The thing which accused was found guilty of doing was negligently driving a car. As I see it, neither the fact that the accused was driving his car on a military post nor the fact that the death of a pedestrian resulted from his negligence, can convert into an offense that which otherwise was not. There is no special limitation (absent some regulation, which was not shown) applicable to a driver on a military post which subjects him to punishment for operating his car in a manner which outside the post would not constitute an offense. The death of Bielawski was a result, not an element, of the offense, if any. This is not an instance of willful conduct where the result might be considered as a part of the act intended by an accused. The death was an unintentional consequence of the negligent operation of the automobile.

The question is whether negligent operation of a car is an offense. It is my opinion that it may be, or it may not be, depending on the circumstances. Negligence may be a very trivial deviation from absolute care, or it may be a gross deviation. Under the rule first stated above, the specification must necessarily exclude innocence. Since

it is clear to me that a person may be negligent to some extent in driving a car, and yet be innocent of an offense, I can reach no other conclusion than that this specification, not including any allegation of wrongfulness nor of facts showing that the negligence was of such character as to constitute an offense, does not charge an act for which accused may be punished.

In effect, the court found that the death of Bielawski was accidental, though resulting from simple negligence, when it found accused not guilty of an unlawful act or gross negligence, without substituting any words alleging wrongful conduct in less degree.

/s/ F. J. Lotterhos
F. J. LOTTERHOS
Judge Advocate.

1st Ind.

War Department, J.A.G.O., 30 May 1944—To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Francis G. Groat (0-763572), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. The accused, while under the influence of alcohol, drove his car on a road inside an air base at night (Spec. 1, Chg. II) and struck an enlisted man walking along the road causing injuries from which he died the following morning. The accused was tried for involuntary manslaughter but the court found him guilty only of negligently causing the death of the enlisted man in the operation of his automobile (Spec., Chg. I). After striking the deceased, the accused did not stop but drove away from the scene of the accident without rendering assitance or making himself known (Spec. 2, Chg. II). Although the accused, in the language of a medical officer who examined him shortly after the accident, was not "very drunk", he was sufficiently under the influence of alcohol to be unable to drive his car in a careful manner and through his negligence caused the death of an innocent soldier. The court might well have convicted the accused of manslaughter under the circumstances of the case. I recommend that the sentence to dismissal be confirmed and carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action,

and a form of Executive action carrying into effect the recommendation made above.

/s/ Myron C. Cramer
MYRON C. CRAMER
Major General,
The Judge Advocate General.

3 Incls.

Incl.1-Rec. of trial.

Incl.2-Drft. of ltr. for sig. of S/W.

Incl.3-Form of Action.

(Sentence confirmed. G.C.M.O. 403, 27 Jul 1944)

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